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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-565

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Appellant,

—v.—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF LONG ISLAND LIGHTING COMPANY AS PETITIONER IN 79-629

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BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF LONG ISLAND LIGHTING COMPANY AS PETITIONER IN 79-629

Interest of Amicus[1]

Long Island Lighting Company (LILCO) is an investor owned company engaged in the generation and sale of electricity and the sale of natural gas to consumers

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[1] Consents of the parties to the filing of this brief *amicus curiae* have been filed with the Clerk of the Court.

in Nassau and Suffolk Counties and a small portion of Queens County in the State of New York. Prior to February, 1977, LILCO engaged in promotional advertising designed to inform consumers of the merits of electric space heating. The regulation of the New York State Public Service Commission at issue in this case imposes a flat ban on all promotional advertising calculated to increase electrical consumption. On May 6, 1977, LILCO commenced an action in the United States District Court for the Eastern District of New York seeking declaratory and injunctive relief against the Commission's flat ban on promotional advertising discussing the merits of electric home heating.[2] On March 30, 1979, the District Court ruled the Commission's total ban on promotional advertising of electric heat violated the First Amendment. Accordingly, the District Court enjoined the Commission from enforcing it against LILCO's advertisements.[3] Oral

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[2] The Federal action, *Long Island Lighting Company v. New York State Public Service Commission*, 77 Civ. 972, challenged both the ban on advertising electric home heating and a simultaneous Commission ban on "controversial" bill inserts. This appeal involves only the ban on promotional advertising. The bill insert issue is currently before this Court in *Consolidated Edison Company v. Public Service Commission*, 79-134, calendared for argument in tandem with this appeal. LILCO has filed a brief *amicus curiae* on the bill insert issue in 79-134. LILCO's petition for certiorari to the Court of Appeals for the Second Circuit prior to judgment on both the bill insert and promotional advertising issues is pending as 79-629. LILCO is prepared to submit an appropriately modified version of its briefs *amicus curiae* in 79-134 and 79-565 as its brief on the merits in 79-629 in the event certiorari is granted.

[3] The District Court upheld the constitutionality of the bill insert ban. The Court stayed its order enjoining enforcement of the ban on promotional advertising pending appellate review. A copy of the District Court's unreported opinion, its judgment, and its stay order are reproduced as an Appendix to this brief.

argument on both the promotional advertising and bill insert issues was heard by a panel of the Second Circuit on October 22, 1979.[4] After this Court noted probable jurisdiction in *Consolidated Edison Company v. New York State Public Service Commission,* 79-134, LILCO, on October 15, 1979, lodged a petition for certiorari prior to judgment with this Court seeking a writ of certiorari on both the bill insert and promotional advertising issues.[5] On November 1, 1979, this Court denied LILCO's application for expedited consideration of its petition for certiorari. All interested parties have consented to the grant of certiorari in the LILCO case and the unopposed petition is currently pending before the Court. LILCO, therefore, is directly interested in the outcome of this appeal both as a litigant in a closely related case and as a company subject to the very restriction at issue herein. Since the ban on discussing the merits of electric home heating impinges directly upon the First Amendment rights of LILCO and LILCO's customers, LILCO submits this brief *amicus curiae* in the hope that it will prove of assistance to the Court in confronting the serious First Amendment issues raised by the Commission's attempt to act as a benevolent censor. The arguments raised by LILCO in opposition to the Commission's ban are wholly supportive of the position of Central Hudson Gas & Electric Corporation in this appeal.

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[4] The appeal and cross-appeal are docketed in the Second Circuit as 79-7374 and 79-7375.

[5] LILCO's petition for certiorari is docketed in this Court as 79-629. A related petition involving only the bill insert issue has been filed by intervening environmental groups as 79-595.

Statement of the Case

LILCO is a summer peaking company. The widespread use of air conditioners in LILCO's service area has created a substantial gap between peak demand for electrical power during the summer months and a greatly reduced demand during the winter months. Thus, the peak winter demand for electricity in LILCO's service area in 1975-76 and 1976-77 was 2365 MW and 2422 MW, respectively. The peak summer demand for electricity in LILCO's service area during the same period was 3000 MW and 3065 MW, respectively. [A 238a].[6] LILCO satisfies its summer peaking demand, in small part, by purchasing additional power from other public utilities. However, it would not be feasible for LILCO to rely solely, or even primarily, upon purchased power to meet summer demand. [A 239a]. Accordingly, LILCO relies primarily upon its own generating capacity to satisfy summer peaking demand. [A 239a]. Given the decrease in winter demand, a portion of LILCO's generating capacity needed to cope with peak summer demand is not utilized during those months in which air conditioners are not in widespread use. [A 239a]. However, the fixed costs associated with owning and operating electric generating equipment remain constant despite seasonal fluctuations in the equipments' use. In order to spread the fixed costs more efficiently, LILCO has followed a consistent policy of exploring potential uses of electricity during the winter months in order to secure a more

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[6] Citations to the record are to the Appendix filed in the Second Circuit, in *Long Island Lighting Company v. New York State Public Service Commission*, 79-7374, 75. A copy of the Second Circuit Appendix has been lodged with the Court.

efficient use of its underutilized winter generating capacity. [A 239a].

A significant potential market for electricity during the winter months on Long Island is its capacity for use in residential and commercial space heating. Residents of Long Island, given its winter climate, must choose among three principal methods of space heating: (a) oil fired space heating; (b) gas fired space heating;[7] and (c) electric space heating. Accordingly, LILCO wishes to resume promotional advertising designed to inform Long Island consumers of the benefits of electric space heating.

Substantial disagreement exists over the relative energy efficiency of oil fired and electric space heating. LILCO believes that when account is taken of the widely varying efficiency levels of individually owned and maintained oil furnaces and the expenditure of fuel required to maintain home delivery of heating oil, no substantial difference exists between the quantity of oil required to generate electricity for home heating and the quantity of oil needed to provide fuel for individual oil burners. The Commission, however, argues that electric heat uses more oil than oil heat. [A 258a]. In order to facilitate a motion for summary judgment, LILCO agreed to assume, solely for the sake of argument, that the Commission is correct in assuming that electric heat uses more oil than oil heat. [A 429a-430a].

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[7] Shortages in the supply of natural gas caused the Commission to prohibit the installation of new gas fired space heaters. However, as of April 19, 1979, Long Island consumers may elect gas fired heating as an alternative to oil or electric heat. No restrictions exist on the promotion of gas or oil heat.

In addition, the parties disagree over the relative ecological consequences of oil and electric heat. LILCO believes that the atmospheric emissions produced by generating electricity for electric space heating are far less damaging to the environment than the emissions from individual oil burners and delivery trucks. The Commission harbors doubts about the ecological consequences of electric heating, especially if linked to a general rise in demand for electricity. [A 258a-59a]. Once again, however, in order to permit the District Court to proceed by summary judgment, LILCO agreed to assume, solely for the sake of argument, that oil heat is ecologically superior to electric heat. [A 429a]. Moreover, although LILCO believes that no correlation exists between the promotion of electric home heating and a general rise in the demand for unrelated electrical services, LILCO agreed to assume for the sake of argument that promotion of electric space heating may cause a general rise in the demand for electricity.[8] Finally, although LILCO has consistently cost-justified its pricing of electric home heating, LILCO agreed to assume for the sake of argument that great difficulty exists in establishing a pricing structure which reflects the marginal cost of providing additional electrical service to each consumer.[9] [A 430a].

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[8] The Commission has never sought to buttress its assertions with anything more than "undifferentiated apprehension". Although LILCO's willingness to assume the correctness of the Commission's positions for the sake of argument makes it unnecessary to reach the issue, it is clear that the Commission must bear the burden of proving the correctness of its assertions should their accuracy become relevant at a subsequent phase of this case. Cf. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

[9] Given the predictable time of day use pattern associated with electric home heating, LILCO is able to establish a pricing struc-

Despite its apparent hostility toward electric space heating, the Commission has taken no steps to regulate its use directly.[10] Thus, adoption of electric space heating remains a lawful, unfettered consumer choice. Rather, the Commission has apparently chosen to inhibit consumer adoption of electric space heating by cutting off the major source of information concerning its merits. Whether the Commission may seek to influence behavior patterns indirectly by manipulating the flow of information available to the consuming public is the major issue posed by this appeal.

Summary of Argument

The New York State Public Service Commission may not seek to influence lawful consumer choices by controlling the flow of truthful information on their respective merits. Since the truthful information on the merits of electric space heating at issue herein is relevant to the making of a lawful consumer choice, the Commission may not absolutely prohibit its dissemination, especially when no restraints exist on the dissemination of information on the merits of competing forms of space heating.

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ture which reflects the marginal cost of delivering electrical service to the class of home heating consumers. [A331a].

[10] In the area of gas fired space heating, the Commission has not hesitated to use its direct regulation powers to restrict consumption.

Questions Presented

1. May the New York State Public Service Commission prohibit Long Island Lighting Company from engaging in truthful promotional advertising designed to inform consumers of the benefits of electric space heating?

2. May New York prohibit truthful promotional advertising of electric space heating while permitting unlimited promotional advertising of oil fired space heating?

ARGUMENT

I.

The Commission's ban on truthful advertising designed to inform consumers of the benefits of electric space heating violates the First Amendment.

In adopting a paternalistic approach to LILCO's speech, the Commission has violated the First Amendment. Instead of respecting the basic notion that, whenever possible, the flow of truthful information should be encouraged in a free society to permit affected individuals to exercise an informed choice among lawful alternatives, the Commission has chosen to stifle and manipulate the flow of information relating to electric space heating in an attempt to inhibit

consumers from selecting what the Commission apparently believes is a socially undesirable form of space heating.

The Commission does not attempt to justify its ban on LILCO's electric home heating advertisements on the ground that they are false, deceptive or misleading. Nor does the Commission claim that LILCO may be unable to supply adequate service to existing as well as projected customers.[11] Finally, the Commission does not argue that the adoption of electric home heating is unlawful or in any way legally questionable. Instead,

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[11] The ban on advertising calculated to increase the use of electricity dates from the Arab oil embargo and was initially imposed on December 6, 1973. The Commission's initial justification for the advertising ban was that the oil shortage created by the Arab embargo rendered it questionable whether existing power commitments could be met. Accordingly, all agreed that new commitments should be avoided. With the end of the embargo and the resumption of adequate oil supplies (albeit at increased cost), to say nothing of the increased use of coal and nuclear power to generate electricity, the basis for the Commission's 1973 ban on advertising has disappeared. However, despite repeated requests to relax the ban to permit advertisements calculated to increase off-peak usage, the Commission clung to its 1973 position. Whether the emergency created by the 1973 oil embargo justified the advertising ban is a close question. Serious doubt exists whether the suppression of speech (as opposed to direct regulation of energy consumption) was a lawful method of coping with the embargo. However, whatever doubtful validity the advertising ban may have enjoyed during the emergency, its current validity cannot be supported on similar grounds. Indeed, the Commission quite candidly does not attempt to justify the ban as an emergency measure made necessary by an oil shortage.

Of course, consumers who do not choose electric heat must adopt an alternative energy source to provide necessary heating during Long Island's winter. Since oil heat is also dependent upon foreign oil, a restriction on electric heat merely shifts the demand for foreign oil, it does not eliminate it.

the Commission seeks to justify its refusal to relax the ban on advertising electric heating solely on the ground that, in the view of the Commission, society will be better served if persons elect to heat their homes by oil rather than by electricity.

The Commission's view that oil heating is societally preferable to electric heating is based, first, on the Commission's assumption that electric home heating consumes more oil (in order to generate the necessary electricity) than oil fired space heating and, second, on the Commission's fears that generation of additional electricity for home heating purposes may produce unspecified adverse ecological consequences.

Although it is unnecessary to a resolution of the basic First Amendment issue posed by the Commission's ban, the Commission's assumptions about the relative consumption of oil in electric and oil heating are open to serious question.[12] Moreover, the Commis-

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[12] The Commission's principal justification for continuing a ban on electric home heating advertisements is that accurate advertisements will induce a number of consumers to choose electric heat instead of oil heat. The Commission believes that such a consumer choice would be unfortunate because it believes that more oil is consumed in generating electricity for home heating than in burning oil directly in oil heating. However, the Commission's assumption about the efficiency of individual oil heating systems in private homes is based on hopelessly inadequate data. Moreover, the Commission has failed to consider the expenditure of oil inherent in providing periodic truck delivery of oil to individual consumers using oil heat. In fact, when realistic account is taken of (1) the true efficiency levels of home oil heating systems of varying age currently in use and (2) the expenditure of oil needed to provide periodic delivery to oil heat systems, virtually no difference exists between the relative consumption of oil to provide electric and oil heat.

sion's assumption about the relative ecological desirability of electric and oil heat is clearly incorrect.[13]

However, even if one assumes that the Commission is justified in believing that electric heat uses more oil and is ecologically inferior to oil heat, the Commission cannot seek to manipulate consumers into the "right" choice by artificially restricting their receipt of information. Apparently, the Commission believes that by cutting off the flow of truthful information about electric home heating (which it considers socially undesirable), the Commission can affect the behavior pattern of New Yorkers in a manner which the Commission (no doubt sincerely) believes is best for them. However, Americans are not rats in a B.F. Skinner experiment.[14] Unlike less fortunate peoples, Americans cannot be manipulated by the State (even a beneficient State) into behavior patterns which the State believes are best for them by the device of varying the informational stimuli to which they are exposed.

Under our system, if the government fears that adverse consequences may flow from a given act, it may

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[13] A subsidiary factor in the Commission's decision to ban electric heat advertising was the assertion of ecological damage (primarily thermal) which would be caused by the increased generation of electricity. However, the Commission utterly failed to consider the ecological consequences of the pollution caused by the burning of oil in inefficient home and apartment heating systems and the obvious ecological consequences of the widespread use of oil delivery trucks. Whatever else one may say about the relative merits of electric and oil heating, it is difficult to argue with the clear ecological superiority enjoyed by electric heat.

[14] Skinner's theories of behavior modification by the adroit manipulation of stimuli are described in Skinner, *Beyond Freedom and Dignity* and Skinner, *Walden II*.

seek to inhibit the performance of that act in two ways: persuasion and deterrence. First, the government may publicize its concern. Thus, in this case, if the Commission believes that adverse consequences will flow to society from the use of electric heat, the Commission may publicize its concern in the expectation that if the adverse consequences are perceived, the disfavored act will not take place. Second, if the adverse consequences are sufficiently serious, the government may seek to outlaw or otherwise penalize the performance of the disfavored act.

Thus, in this case, if the Commission believes that adverse consequences flow to society from the use of electric heat, it may publicize those consequences. Moreover, if the consequences are sufficiently serious, the Commission may seek to place direct restrictions upon its use.[15] The Commission, however, elected neither persuasion nor deterrence. Instead, the Commission seeks to inhibit the performance of what it perceives as a disfavored act (the adoption of electric heating) not by providing additional information about its alleged consequences (persuasion); not by seeking to outlaw or otherwise penalize its use (deterrence), but by artificially restricting and manipulating the flow of accurate information about it (deception). In adopting deception as a behavior control technique, the Commission has ignored the First Amendment.

In *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977) and *Carey v. Population Services, Inc.,* 431 U.S. 678 (1977), this Court invalidated

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[15] The Commission has engaged in such direct regulation in the gas fired space heating area.

two similar attempts by well meaning public officials to influence behavior by controlling speech.

In *Linmark*, the Township of Willingboro, justifiably concerned over panic selling and in an effort to maintain integrated housing, forbade sellers from placing "For Sale" signs on their property. No restrictions were imposed on alternative sources of dissemination, such as newspaper advertisements. Willingboro attempted to justify the limited suppression of speech by arguing that adverse consequences (panic selling and the disintegration of integrated neighborhoods) would flow from the speech in question. Mr. Justice Marshall, writing for a unanimous Court, rejected the notion that government may regulate the flow of accurate information merely because it believes that such information might have "detrimental" social consequences. As Justice Marshall noted:

> "After *Virginia Pharmacy* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.'" 431 U.S. at 92, n.6.

In words particularly appropriate to the case at bar, Mr. Justice Marshall held:

> "The constitutional defect in this ordinance . . . is . . . basic. The Township Council here, like the Virginia Assembly in *Virginia Pharmacy*, acted to prevent its residents from obtaining certain information. . . . The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners self-interest and the corporate interest of the

welfare", the Commission has chosen to ban the speech. As Justice Marshall's decision for a unanimous Court in *Linmark* demonstrates, fifty years of First Amendment doctrine protects us from the renascence of the discredited notion that speech may be suppressed merely because the State is unhappy with its possible consequences. Compare, *Gitlow v. New York*, 268 U.S. 652 (1925) with *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Of course, until relatively recently, the "commercial" nature of the speech at issue herein would have raised a serious question as to its coverage under the First Amendment. E.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942).[19] However, in a series of cases, this Court has unequivocally rejected the notion that commercial speech is beyond the pale of First Amendment protection.[20]

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[19] The application of the "old" commercial speech exception to the First Amendment may be traced through *Semmler v. Dental Examiners*, 294 U.S. 608 (1935) (price advertising by dentists not protected); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (commercial leafletting not protected); *Williamson v. Lee Optical Company*, 348 U.S. 483 (1955) (price advertising not protected); *Head v. New Mexico Board*, 374 U.S. 424 (1963).

[20] The rise of the "new" commercial speech doctrine in the Supreme Court may be traced through *Bigelow v. Virginia*, 421 U.S. 809 (1975) (commercial abortion ad in newspaper protected); *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748 (1976) (price advertising for prescription drugs protected); *California State Board of Pharmacy v. Terry*, 395 F. Supp. 94 (N.D. Cal. 1976) aff'd 426 U.S. 913 (1977) (same); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (For Sale signs on residential property protected). *Carey v. Population Services, Inc.*, 431 U.S. 678 (1977) (contraceptive advertising protected); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (lawyer advertising protected); *First National Bank of Bos-*

In *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court ruled that a commercial advertisement in a Virginia newspaper informing Virginians of the existence of abortion clinics lawful in New York (but unlawful in Virginia) was protected by the First Amendment. The Court explicitly rejected Virginia's argument that it possessed the power to suppress accurate information about a matter which Virginia deemed unlawful. It seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information about a perfectly lawful consumer choice.

In *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748 (1976), this Court invalidated Virginia's ban on price advertising of prescription drugs. The Court explicitly rejected Virginia's argument that it possessed the power to suppress accurate commercial information merely because a legitimate governmental interest would be advanced by suppression. If Virginia lacked power to suppress accurate commercial information in order to insure the professional integrity of its pharmacists, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information to further amorphous and highly questionable interests of conservation and ecology.

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ton v. Bellotti, 435 U.S. 765 (1978) (corporate speech entitled to First Amendment protection). See also, *Friedman v. Rogers*, 440 U.S. 1 (1979) (prohibition on trade names valid because of capacity to mislead). See also, *Metpath, Inc. v. Imperato*, 450 F. Supp. 115, 117 (S.D.N.Y. 1978).

In *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), this Court invalidated a local ban on "For Sale" signs on residential property. If New Jersey lacked power to suppress accurate commercial information in order to maintain the stability of an integrated residential neighborhood, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information to advance its highly debatable views on oil conservation and ecology.

In *Carey v. Population Services, Inc.,* 431 U.S. 678 (1977), this Court invalidated New York's ban on the advertising of contraceptives. If New York lacked power to suppress accurate commercial information in order to deter sexual promiscuity among teenagers, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information which is likely to lead to nothing more serious than the installation of electric home heating.

In *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), this Court invalidated Arizona's ban of price and service advertising by lawyers. If lawyers are constitutionally permitted to disseminate accurate commercial information pertaining to fees and services, it seems an *a fortiori* proposition that LILCO may disseminate similarly accurate information pertaining to its fees and services.

A common theme linking *Bigelow, Virginia Pharmacy, Linmark Associates, Carey* and *Bates* is an increased concern with the right of the public to receive all available information relevant to the making of an informed choice among equally lawful courses of conduct. Thus, in protecting commercial speech, this Court recognized, once again, the right to know as a corollary

of the right to speak.[21] Since the Commission's absolute ban prevents lawful, accurate information from reaching the consuming public, it violates "the right to know."

Of course, LILCO does not suggest that the Commission is without power to oversee a utility's commercial communications. First, LILCO does not challenge the Commission's power to establish a reasonable cost-allocation formula for commercial speech for use in rate-making computations.[22] Second, LILCO does not challenge the Commission's power and responsibility to guard against false, misleading or deceptive advertising by public utilities. See generally, Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 Harv. L. Rev. 661 (1977). See also, *Friedman v. Rogers,* 440 U.S. 1 (1979). Third, plaintiff does not challenge the power of the Commission to regulate

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[21] The recognition that the First Amendment protects the right to receive information as well as the right to disseminate it dates from *Martin v. Struthers,* 319 U.S. 141 (1943), when this Court invalidated an ordinance outlawing house to house canvassing because it interfered with the right of a householder to receive information. See also, *Thomas v. Collins,* 323 U.S. 516 (1945). The first explicit recognition of a "right to know" was in *Lamont v. Postmaster General,* 381 U.S. 301 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers." *Id.* at 308 (Mr. Justice Brennan concurring). Most recently, in *Friedman v. Rogers,* 440 U.S. 1 (1979), this Court upheld a Texas ban on trade names by optometrists since the use of trade names often caused consumer confusion.

[22] The effect of such a cost allocation formula is to place a ceiling on the amounts which a utility may expend on advertising and include in its rate-making base.

Statement of the Case

LILCO is a summer peaking company. The widespread use of air conditioners in LILCO's service area has created a substantial gap between peak demand for electrical power during the summer months and a greatly reduced demand during the winter months. Thus, the peak winter demand for electricity in LILCO's service area in 1975-76 and 1976-77 was 2365 MW and 2422 MW, respectively. The peak summer demand for electricity in LILCO's service area during the same period was 3000 MW and 3065 MW, respectively. [A 238a].[6] LILCO satisfies its summer peaking demand, in small part, by purchasing additional power from other public utilities. However, it would not be feasible for LILCO to rely solely, or even primarily, upon purchased power to meet summer demand. [A 239a]. Accordingly, LILCO relies primarily upon its own generating capacity to satisfy summer peaking demand. [A 239a]. Given the decrease in winter demand, a portion of LILCO's generating capacity needed to cope with peak summer demand is not utilized during those months in which air conditioners are not in widespread use. [A 239a]. However, the fixed costs associated with owning and operating electric generating equipment remain constant despite seasonal fluctuations in the equipments' use. In order to spread the fixed costs more efficiently, LILCO has followed a consistent policy of exploring potential uses of electricity during the winter months in order to secure a more

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efficient use of its underutilized winter generating capacity. [A 239a].

A significant potential market for electricity during the winter months on Long Island is its capacity for use in residential and commercial space heating. Residents of Long Island, given its winter climate, must choose among three principal methods of space heating: (a) oil fired space heating; (b) gas fired space heating;[7] and (c) electric space heating. Accordingly, LILCO wishes to resume promotional advertising designed to inform Long Island consumers of the benefits of electric space heating.

Substantial disagreement exists over the relative energy efficiency of oil fired and electric space heating. LILCO believes that when account is taken of the widely varying efficiency levels of individually owned and maintained oil furnaces and the expenditure of fuel required to maintain home delivery of heating oil, no substantial difference exists between the quantity of oil required to generate electricity for home heating and the quantity of oil needed to provide fuel for individual oil burners. The Commission, however, argues that electric heat uses more oil than oil heat. [A 258a]. In order to facilitate a motion for summary judgment, LILCO agreed to assume, solely for the sake of argument, that the Commission is correct in assuming that electric heat uses more oil than oil heat. [A 429a-430a].

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[7] Shortages in the supply of natural gas caused the Commission to prohibit the installation of new gas fired space heaters. However, as of April 19, 1979, Long Island consumers may elect gas fired heating as an alternative to oil or electric heat. No restrictions exist on the promotion of gas or oil heat.

In addition, the parties disagree over the relative ecological consequences of oil and electric heat. LILCO believes that the atmospheric emissions produced by generating electricity for electric space heating are far less damaging to the environment than the emissions from individual oil burners and delivery trucks. The Commission harbors doubts about the ecological consequences of electric heating, especially if linked to a general rise in demand for electricity. [A 258a-59a]. Once again, however, in order to permit the District Court to proceed by summary judgment, LILCO agreed to assume, solely for the sake of argument, that oil heat is ecologically superior to electric heat. [A 429a]. Moreover, although LILCO believes that no correlation exists between the promotion of electric home heating and a general rise in the demand for unrelated electrical services, LILCO agreed to assume for the sake of argument that promotion of electric space heating may cause a general rise in the demand for electricity.[8] Finally, although LILCO has consistently cost-justified its pricing of electric home heating, LILCO agreed to assume for the sake of argument that great difficulty exists in establishing a pricing structure which reflects the marginal cost of providing additional electrical service to each consumer.[9] [A 430a].

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[8] The Commission has never sought to buttress its assertions with anything more than "undifferentiated apprehension". Although LILCO's willingness to assume the correctness of the Commission's positions for the sake of argument makes it unnecessary to reach the issue, it is clear that the Commission must bear the burden of proving the correctness of its assertions should their accuracy become relevant at a subsequent phase of this case. Cf. *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

[9] Given the predictable time of day use pattern associated with electric home heating, LILCO is able to establish a pricing struc-

Despite its apparent hostility toward electric space heating, the Commission has taken no steps to regulate its use directly.[10] Thus, adoption of electric space heating remains a lawful, unfettered consumer choice. Rather, the Commission has apparently chosen to inhibit consumer adoption of electric space heating by cutting off the major source of information concerning its merits. Whether the Commission may seek to influence behavior patterns indirectly by manipulating the flow of information available to the consuming public is the major issue posed by this appeal.

Summary of Argument

The New York State Public Service Commission may not seek to influence lawful consumer choices by controlling the flow of truthful information on their respective merits. Since the truthful information on the merits of electric space heating at issue herein is relevant to the making of a lawful consumer choice, the Commission may not absolutely prohibit its dissemination, especially when no restraints exist on the dissemination of information on the merits of competing forms of space heating.

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ture which reflects the marginal cost of delivering electrical service to the class of home heating consumers. [A331a].

[10] In the area of gas fired space heating, the Commission has not hesitated to use its direct regulation powers to restrict consumption.

Questions Presented

1. May the New York State Public Service Commission prohibit Long Island Lighting Company from engaging in truthful promotional advertising designed to inform consumers of the benefits of electric space heating?

2. May New York prohibit truthful promotional advertising of electric space heating while permitting unlimited promotional advertising of oil fired space heating?

ARGUMENT

I.

The Commission's ban on truthful advertising designed to inform consumers of the benefits of electric space heating violates the First Amendment.

In adopting a paternalistic approach to LILCO's speech, the Commission has violated the First Amendment. Instead of respecting the basic notion that, whenever possible, the flow of truthful information should be encouraged in a free society to permit affected individuals to exercise an informed choice among lawful alternatives, the Commission has chosen to stifle and manipulate the flow of information relating to electric space heating in an attempt to inhibit

consumers from selecting what the Commission apparently believes is a socially undesirable form of space heating.

The Commission does not attempt to justify its ban on LILCO's electric home heating advertisements on the ground that they are false, deceptive or misleading. Nor does the Commission claim that LILCO may be unable to supply adequate service to existing as well as projected customers.[11] Finally, the Commission does not argue that the adoption of electric home heating is unlawful or in any way legally questionable. Instead,

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[11] The ban on advertising calculated to increase the use of electricity dates from the Arab oil embargo and was initially imposed on December 6, 1973. The Commission's initial justification for the advertising ban was that the oil shortage created by the Arab embargo rendered it questionable whether existing power commitments could be met. Accordingly, all agreed that new commitments should be avoided. With the end of the embargo and the resumption of adequate oil supplies (albeit at increased cost), to say nothing of the increased use of coal and nuclear power to generate electricity, the basis for the Commission's 1973 ban on advertising has disappeared. However, despite repeated requests to relax the ban to permit advertisements calculated to increase off-peak usage, the Commission clung to its 1973 position. Whether the emergency created by the 1973 oil embargo justified the advertising ban is a close question. Serious doubt exists whether the suppression of speech (as opposed to direct regulation of energy consumption) was a lawful method of coping with the embargo. However, whatever doubtful validity the advertising ban may have enjoyed during the emergency, its current validity cannot be supported on similar grounds. Indeed, the Commission quite candidly does not attempt to justify the ban as an emergency measure made necessary by an oil shortage.

Of course, consumers who do not choose electric heat must adopt an alternative energy source to provide necessary heating during Long Island's winter. Since oil heat is also dependent upon foreign oil, a restriction on electric heat merely shifts the demand for foreign oil, it does not eliminate it.

the Commission seeks to justify its refusal to relax the ban on advertising electric heating solely on the ground that, in the view of the Commission, society will be better served if persons elect to heat their homes by oil rather than by electricity.

The Commission's view that oil heating is societally preferable to electric heating is based, first, on the Commission's assumption that electric home heating consumes more oil (in order to generate the necessary electricity) than oil fired space heating and, second, on the Commission's fears that generation of additional electricity for home heating purposes may produce unspecified adverse ecological consequences.

Although it is unnecessary to a resolution of the basic First Amendment issue posed by the Commission's ban, the Commission's assumptions about the relative consumption of oil in electric and oil heating are open to serious question.[12] Moreover, the Commis-

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[12] The Commission's principal justification for continuing a ban on electric home heating advertisements is that accurate advertisements will induce a number of consumers to choose electric heat instead of oil heat. The Commission believes that such a consumer choice would be unfortunate because it believes that more oil is consumed in generating electricity for home heating than in burning oil directly in oil heating. However, the Commission's assumption about the efficiency of individual oil heating systems in private homes is based on hopelessly inadequate data. Moreover, the Commission has failed to consider the expenditure of oil inherent in providing periodic truck delivery of oil to individual consumers using oil heat. In fact, when realistic account is taken of (1) the true efficiency levels of home oil heating systems of varying age currently in use and (2) the expenditure of oil needed to provide periodic delivery to oil heat systems, virtually no difference exists between the relative consumption of oil to provide electric and oil heat.

sion's assumption about the relative ecological desirability of electric and oil heat is clearly incorrect.[13]

However, even if one assumes that the Commission is justified in believing that electric heat uses more oil and is ecologically inferior to oil heat, the Commission cannot seek to manipulate consumers into the "right" choice by artificially restricting their receipt of information. Apparently, the Commission believes that by cutting off the flow of truthful information about electric home heating (which it considers socially undesirable), the Commission can affect the behavior pattern of New Yorkers in a manner which the Commission (no doubt sincerely) believes is best for them. However, Americans are not rats in a B.F. Skinner experiment.[14] Unlike less fortunate peoples, Americans cannot be manipulated by the State (even a beneficient State) into behavior patterns which the State believes are best for them by the device of varying the informational stimuli to which they are exposed.

Under our system, if the government fears that adverse consequences may flow from a given act, it may

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[13] A subsidiary factor in the Commission's decision to ban electric heat advertising was the assertion of ecological damage (primarily thermal) which would be caused by the increased generation of electricity. However, the Commission utterly failed to consider the ecological consequences of the pollution caused by the burning of oil in inefficient home and apartment heating systems and the obvious ecological consequences of the widespread use of oil delivery trucks. Whatever else one may say about the relative merits of electric and oil heating, it is difficult to argue with the clear ecological superiority enjoyed by electric heat.

[14] Skinner's theories of behavior modification by the adroit manipulation of stimuli are described in Skinner, *Beyond Freedom and Dignity* and Skinner, *Walden II*.

seek to inhibit the performance of that act in two ways: persuasion and deterrence. First, the government may publicize its concern. Thus, in this case, if the Commission believes that adverse consequences will flow to society from the use of electric heat, the Commission may publicize its concern in the expectation that if the adverse consequences are perceived, the disfavored act will not take place. Second, if the adverse consequences are sufficiently serious, the government may seek to outlaw or otherwise penalize the performance of the disfavored act.

Thus, in this case, if the Commission believes that adverse consequences flow to society from the use of electric heat, it may publicize those consequences. Moreover, if the consequences are sufficiently serious, the Commission may seek to place direct restrictions upon its use.[15] The Commission, however, elected neither persuasion nor deterrence. Instead, the Commission seeks to inhibit the performance of what it perceives as a disfavored act (the adoption of electric heating) not by providing additional information about its alleged consequences (persuasion); not by seeking to outlaw or otherwise penalize its use (deterrence), but by artificially restricting and manipulating the flow of accurate information about it (deception). In adopting deception as a behavior control technique, the Commission has ignored the First Amendment.

In *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977) and *Carey v. Population Services, Inc.,* 431 U.S. 678 (1977), this Court invalidated

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[15] The Commission has engaged in such direct regulation in the gas fired space heating area.

two similar attempts by well meaning public officials to influence behavior by controlling speech.

In *Linmark,* the Township of Willingboro, justifiably concerned over panic selling and in an effort to maintain integrated housing, forbade sellers from placing "For Sale" signs on their property. No restrictions were imposed on alternative sources of dissemination, such as newspaper advertisements. Willingboro attempted to justify the limited suppression of speech by arguing that adverse consequences (panic selling and the disintegration of integrated neighborhoods) would flow from the speech in question. Mr. Justice Marshall, writing for a unanimous Court, rejected the notion that government may regulate the flow of accurate information merely because it believes that such information might have "detrimental" social consequences. As Justice Marshall noted:

> "After *Virginia Pharmacy* it is clear that commercial speech cannot be banned because of an unsubstantiated belief that its impact is 'detrimental.'" 431 U.S. at 92, n.6.

In words particularly appropriate to the case at bar, Mr. Justice Marshall held:

> "The constitutional defect in this ordinance . . . is . . . basic. The Township Council here, like the Virginia Assembly in *Virginia Pharmacy,* acted to prevent its residents from obtaining certain information. . . . The Council has sought to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners self-interest and the corporate interest of the

township. . . . As we said . . . in rejecting Virginia's claim that the only way it could enable its citizens to find their self-interest was to deny them information that is neither false nor misleading:

"There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that information is not itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of misuse if it is freely available, that the First Amendment makes for us." [Quoting from *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, Inc.*, 425 U.S. 748 (1976) at 770]. 431 U.S. at 96-97.

In *Carey v. Population Services, Inc.*, 431 U.S. 678 (1977), this Court invalidated a prohibition on the advertising of contraceptives in New York State. As in the instant case, New York authorities sought to justify the suppression of accurate information concerning contraceptives on the ground that adverse social consequences (sexual promiscuity, especially among teengers) would result from the advertisement of contraceptives.

In *Carey*, as in *Linmark*, the Court refused to tolerate the suppression of accurate information as a permissible means of regulating public behavior. Thus, if

the Commission is correct in believing the adoption of electric heat is a social evil, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California,* 274 U.S. 357, 372 (1927) (Brandeis, J. concurring).

A moment's reflection places the Commission's purported justification for suppressing electric home heating advertisements in historical perspective. Prior to the initial enunciation of modern First Amendment doctrine by Justices Holmes and Brandeis during the 1920's,[16] the analysis of First Amendment issues was dominated by what has come to be known as the "bad tendency" test.[17] Under the "bad tendency" test, the State was empowered to outlaw "utterances inimical to the public welfare".[18] Since the Commission has determined that the dissemination of accurate information concerning electric home heating will have a "bad tendency" to lead to consequences "inimical to the public

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[16] The emergence of a modern vision of the First Amendment may be traced through *Schenck v. United States,* 249 U.S. 47 (1919); *Abrams v. United States,* 250 U.S. 616, 624 (1919) (Holmes, J., dissenting); *Gitlow v. New York,* 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); *Whitney v. California,* 274 U.S. 357, 372 (1927) (Brandeis, J., concurring). See also, *Fiske v. Kansas,* 274 U.S. 380 (1927) (apparently the first reversal of a state conviction on what would today be viewed as classic First Amendment analysis).

[17] Dorsen, Bender, and Neuborne, *Political and Civil Rights in the United States,* Vol. I (4th ed.) at 57.

[18] *Gitlow v. New York,* 268 U.S. 652 (1925) at 667. Such a broad power rendered First Amendment protection non-existent as a practical matter. Indeed, use of a bad tendency analysis is the characteristic device by which the ringing affirmations of free speech rights which routinely appear in totalitarian constitutions are stripped of practical vitality.

welfare", the Commission has chosen to ban the speech. As Justice Marshall's decision for a unanimous Court in *Linmark* demonstrates, fifty years of First Amendment doctrine protects us from the renascence of the discredited notion that speech may be suppressed merely because the State is unhappy with its possible consequences. Compare, *Gitlow v. New York*, 268 U.S. 652 (1925) with *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

Of course, until relatively recently, the "commercial" nature of the speech at issue herein would have raised a serious question as to its coverage under the First Amendment. E.g., *Valentine v. Chrestensen*, 316 U.S. 52 (1942).[19] However, in a series of cases, this Court has unequivocally rejected the notion that commercial speech is beyond the pale of First Amendment protection.[20]

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[19] The application of the "old" commercial speech exception to the First Amendment may be traced through *Semmler v. Dental Examiners*, 294 U.S. 608 (1935) (price advertising by dentists not protected); *Valentine v. Chrestensen*, 316 U.S. 52 (1942) (commercial leafletting not protected); *Williamson v. Lee Optical Company*, 348 U.S. 483 (1955) (price advertising not protected); *Head v. New Mexico Board*, 374 U.S. 424 (1963).

[20] The rise of the "new" commercial speech doctrine in the Supreme Court may be traced through *Bigelow v. Virginia*, 421 U.S. 809 (1975) (commercial abortion ad in newspaper protected); *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council*, 425 U.S. 748 (1976) (price advertising for prescription drugs protected); *California State Board of Pharmacy v. Terry*, 395 F. Supp. 94 (N.D. Cal. 1976) aff'd 426 U.S. 913 (1977) (same); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977) (For Sale signs on residential property protected). *Carey v. Population Services, Inc.*, 431 U.S. 678 (1977) (contraceptive advertising protected); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (lawyer advertising protected); *First National Bank of Bos-*

In *Bigelow v. Virginia,* 421 U.S. 809 (1975), this Court ruled that a commercial advertisement in a Virginia newspaper informing Virginians of the existence of abortion clinics lawful in New York (but unlawful in Virginia) was protected by the First Amendment. The Court explicitly rejected Virginia's argument that it possessed the power to suppress accurate information about a matter which Virginia deemed unlawful. It seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information about a perfectly lawful consumer choice.

In *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council,* 425 U.S. 748 (1976), this Court invalidated Virginia's ban on price advertising of prescription drugs. The Court explicitly rejected Virginia's argument that it possessed the power to suppress accurate commercial information merely because a legitimate governmental interest would be advanced by suppression. If Virginia lacked power to suppress accurate commercial information in order to insure the professional integrity of its pharmacists, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information to further amorphous and highly questionable interests of conservation and ecology.

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ton v. Bellotti, 435 U.S. 765 (1978) (corporate speech entitled to First Amendment protection). See also, *Friedman v. Rogers,* 440 U.S. 1 (1979) (prohibition on trade names valid because of capacity to mislead). See also, *Metpath, Inc. v. Imperato,* 450 F. Supp. 115, 117 (S.D.N.Y. 1978).

In *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), this Court invalidated a local ban on "For Sale" signs on residential property. If New Jersey lacked power to suppress accurate commercial information in order to maintain the stability of an integrated residential neighborhood, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information to advance its highly debatable views on oil conservation and ecology.

In *Carey v. Population Services, Inc.,* 431 U.S. 678 (1977), this Court invalidated New York's ban on the advertising of contraceptives. If New York lacked power to suppress accurate commercial information in order to deter sexual promiscuity among teenagers, it seems an *a fortiori* proposition that the Commission may not suppress accurate commercial information which is likely to lead to nothing more serious than the installation of electric home heating.

In *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977), this Court invalidated Arizona's ban of price and service advertising by lawyers. If lawyers are constitutionally permitted to disseminate accurate commercial information pertaining to fees and services, it seems an *a fortiori* proposition that LILCO may disseminate similarly accurate information pertaining to its fees and services.

A common theme linking *Bigelow, Virginia Pharmacy, Linmark Associates, Carey* and *Bates* is an increased concern with the right of the public to receive all available information relevant to the making of an informed choice among equally lawful courses of conduct. Thus, in protecting commercial speech, this Court recognized, once again, the right to know as a corollary

of the right to speak.[21] Since the Commission's absolute ban prevents lawful, accurate information from reaching the consuming public, it violates "the right to know."

Of course, LILCO does not suggest that the Commission is without power to oversee a utility's commercial communications. First, LILCO does not challenge the Commission's power to establish a reasonable cost-allocation formula for commercial speech for use in rate-making computations.[22] Second, LILCO does not challenge the Commission's power and responsibility to guard against false, misleading or deceptive advertising by public utilities. See generally, Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661 (1977). See also, *Friedman v. Rogers*, 440 U.S. 1 (1979). Third, plaintiff does not challenge the power of the Commission to regulate

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[21] The recognition that the First Amendment protects the right to receive information as well as the right to disseminate it dates from *Martin v. Struthers*, 319 U.S. 141 (1943), when this Court invalidated an ordinance outlawing house to house canvassing because it interfered with the right of a householder to receive information. See also, *Thomas v. Collins*, 323 U.S. 516 (1945). The first explicit recognition of a "right to know" was in *Lamont v. Postmaster General*, 381 U.S. 301 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren market place of ideas that had only sellers and no buyers." *Id.* at 308 (Mr. Justice Brennan concurring). Most recently, in *Friedman v. Rogers*, 440 U.S. 1 (1979), this Court upheld a Texas ban on trade names by optometrists since the use of trade names often caused consumer confusion.

[22] The effect of such a cost allocation formula is to place a ceiling on the amounts which a utility may expend on advertising and include in its rate-making base.

advertisements urging unlawful activity. E.g., *Pittsburgh Press v. Human Relations Commission,* 413 U.S. 376 (1973).[23] Fourth, LILCO recognizes that the government may have a greater power to regulate commercial solicitations on electronic media. Cf. *Capital Broadcasting Co. v. Mitchell,* 333 F. Supp. 582 (D.D.C. 1971) aff'd 405 U.S. 1000 (1972). Finally, LILCO does not challenge the power of the Commission to impose emergency restraints on commercial speech when serious doubt (as opposed to "undifferentiated apprehension") exists concerning the ability of the public utility to provide the advertised service.[24]

In the instant case, however, the Commission has proffered no justification for its ban on electric home heating advertisements which does not run squarely afoul of the First Amendment. The observation of Mr. Justice Blackmun, writing for the Court in *Bates* and invalidating Arizona's ban on lawyer advertising, seems particularly applicable to the Commission's attempt to ban electric heating advertisments:

> . . . it seems peculiar to deny the consumer, on the ground that the information is incomplete, at least some of the relevant information needed to reach an informed decision. The alternative—the prohibi-

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[23] In *Bigelow v. Virginia, supra,* the illegality of a given act (abortion) in Virginia was not sufficient to ban the dissemination to Virginians of information about its lawful availability in New York. Presumably, however, information about its availability in Virginia could have been suppressed.

[24] Such regulation may well be merely a subspecies of the power to deal with false, misleading or deceptive advertising.

> tion of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.* (emphasis added) *Bates v. State Bar of Arizona,* 433 U.S. 350, at 374-75.

Since the Commission's ban on truthful dissemination of information on the merits of electric home heating is explicitly based on the "benefits" of public ignorance, the decision of the Federal District Court in *Long Island Lighting Company v. New York State Public Service Commission,* 77 Civ. 972, invalidating it should be affirmed.

Despite the substantial First Amendment protection enjoyed by LILCO's commercial speech, the Commission seeks to uphold its ban by arguing, first, that the ban on the promotion of electricity advances a significant state interest by dampening unnecessary and socially undesirable growth in the demand for electricity, and second, that the ban does not deprive consumers of commercially relevant information, since no competition exists in the sale of electricity. The District Court quite properly rejected the Commission's arguments, noting that information control is an impermissible method of advancing even significant governmental goals and that consumers, confronted with a choice between electric and oil heat, possess a clear interest in receiving information on the respective merits of each. *Long Island Lighting Company v. New York State Public Service Commission,* 77 Civ. 972 (E.D.N.Y.

1979). However, the New York Court of Appeals accepted both aspects of the Commission's argument. *Central Hudson Gas & Electric Corporation v. New York State Public Service Commission*, 47 N.Y.2d 94, 417 N.Y.S.2d 30 (1979), prob. jur. noted, ____ U.S. ____ (1979). Neither aspect of the Commission's position can withstand analysis.

First, LILCO does not quarrel with the Commission's twin goals of conservation and the avoidance of unnecessary growth in electrical demand. It is with the method chosen by the Commission to advance its goals—information control—that LILCO disagrees. Rather than impose direct controls on electric space heating, the Commission has attempted to dampen demand indirectly by denying consumers truthful and non-coercive information relevant to making an informed, lawful choice. Such a covert form of regulation is deeply troubling, since it provides consumers with the illusion of free choice while effectively conditioning them to act in a pre-determined manner. Moreover, regulation by information control allows regulators to carry out wide ranging schemes without subjecting them to open scrutiny. Thus, in the instant case, the Commission has admitted that it would be unable to make a case for direct restrictions on electric heat. However, by cutting off information on electric heat, the Commission is able to achieve its *de facto* prohibition without subjecting its decision to political or judicial scrutiny.

LILCO has no quarrel with the Commission's obligation to assure that utility advertising is both truthful and non-coercive. Indeed, this Court has quite properly held that coercive or misleading commercial speech is

not entitled to constitutional protection. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Friedman v. Rogers*, 440 U.S. 1 (1979). However, the Commission does not object to LILCO's speech as coercive or misleading. Rather, it is precisely because LILCO's speech is accurate; and because the Commission fears that accurate information may lead consumers to make what, to the Commission, appears a socially undesirable choice, that the advertisements have been banned.[25] Such an approach is paternalistic in the extreme and in clear violation of the First Amendment.[26]

Second, the Commission's argument that consumers receive no benefit from LILCO's advertisements is un-

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[25] In fairness, the Commission has denied banning LILCO's ads merely because it fears that consumers might act upon them. If, in fact, LILCO is incorrect in assuming that the Commission adheres to its ban because it fears that, otherwise, consumers will choose electric heat in greater numbers, then no rational basis whatever exists for the ban.

[26] Wholly apart from the Commission's power to ban truthful information about electric heat, LILCO does not believe that such a ban would result in conservation or a dampening in unnecessary demand. Given Long Island's climate, some form of space heating is imperative. Shifting consumers from electric to oil heat merely changes the form of the demand; it does not materially decrease it. Moreover, since LILCO is a summer peaking company, anticipated increases in off-peak winter demand attributable to electric space heating may be met by utilizing excess generating capacity.

However, even if the Commission were able to demonstrate that a limitation on electric space heating would save oil and dampen unnecessary demand, the Commission would, nevertheless, lack the power to achieve the limitation covertly by denying consumers access to information about electric heat. It is precisely the gravamen of this case that the Commission's regulatory powers must be exercised openly by direct regulation of disfavored conduct rather than covertly by the suppression of speech which might lead to the disfavored conduct.

tenable. The Commission, in an attempt to distinguish the recent decisions of this Court recognizing a First Amendment right to receive commercial information relevant to lawful consumer choices, argues that the monopoly status of LILCO as a seller of electricity eliminates the need for commercial information concerning its purchase. Since, the Commission argues, both supplier and price are fixed, consumers receive no real benefit from advertisements promoting electricity. However, whatever the facial validity of the Commission's ban, LILCO does not seek to invalidate the ban on its face, but only as applied to LILCO's electric heating advertisements. In the context of such a narrow "as applied" challenge, the Commission's attempt to salvage its regulation by citing LILCO's monopoly status collapses. LILCO, as a supplier of electric space heating is in direct competition with fuel oil dealers for a share of the Long Island space heating market.[27] In such a competitive context the consumer's need for information relevant to the making of an informed consumer choice between oil and electric heat is unaffected by LILCO's status as the sole supplier of electricity.[28]

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[27] No restriction exists on the promotion of oil heat. The unfairness of permitting fuel oil dealers complete freedom to promote oil heat, while forbidding the promotion of electric heat, is discussed *infra*, at Point II.

[28] Even if one were to accept the Commission's pure monopoly model, consumers must, nevertheless, decide whether to expend finite resources to purchase more electricity or to purchase unrelated goods and services in competition for the consumer's dollar. Thus, even at its strongest, the Commission's ban raises First Amendment issues, since even in a pure monopoly context, truthful, non-coercive information would be of assistance to a consumer in making an inevitable market choice.

The arguments raised by the Commission in defense of its regulation have as a common denominator the Commission's insistence that the constitutionality of its ban on promoting electricity be judged in the abstract. Thus, the Commission argues, because a state of facts might exist which would justify a ban on promoting certain categories of electrical usage, a blanket ban on promoting all electrical usage is constitutional.[29] LILCO, on the other hand, has urged that the constitutionality of a restriction on commercial speech must be judged "as applied". Thus, LILCO argues, even if a state of facts might exist which would justify a ban on promoting certain categories of electrical usage, the ban on promoting electric heat cannot survive constitutional scrutiny. The District Court followed an "as applied" analysis in striking down, not the entire ban, but merely its application to LILCO's advertisements. *Long Island Lighting Company v. New York State Public Service Commission,* 77 Civ. 972 (E.D.N.Y. 1979). The New York Court of Appeals, influenced no doubt by the summary nature of the procedure pur-

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[29] The ideal fact pattern hypothesized by the Commission involves the promotion of electrical usage in circumstances free from competition by other energy sources and where on-peak demand would be augmented. Under such a hypothetical fact pattern, the Commission argues, the consumer receives little information of commercial value, since he has no choice between competing energy sources and the public suffers a severe detriment, since the augmenting of on-peak demand requires the construction of additional generating facilities. Even under such ideal conditions, LILCO believes that the Commission may not suppress truthful speech to achieve a covert regulatory end. However, one need not decide the hypothetical constitutionality of the Commission's regulation to recognize that when applied to the facts of the LILCO case—involving competing energy sources and off-peak demand—it is unconstitutional.

suant to Article 78 CPLR, viewed the regulation facially and upheld its constitutionality. *Central Hudson Gas & Electric Corporation v. New York State Public Service Commission, supra.* Thus, a fundamental issue posed by this appeal is whether the Commission's regulation should be reviewed facially or "as applied."[30] Traditionally, economic regulations issued by administrative agencies have been upheld pursuant to facial rather than "as applied" review. Eg. *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955). Thus, once an economic regulation is deemed rationally related to the advancement of a legitimate state interest, courts generally have declined to inquire whether the regulation "as applied" actually advances the state interest in question. The Commission's position mirrors the traditional economic regulatory approach.

In a First Amendment context, however, precisely the opposite approach to judicial review has arisen. Thus, under the First Amendment overbreadth doctrine, once a statute is perceived as potentially applicable to protected activity, this Court has invalidated it without inquiring whether the speech in question could have been subjected to narrower regulation. E.g. *Lewis v. New Orleans,* 415 U.S. 130 (1974).

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[30] The traditional posture of the litigants on this issue is reversed in this case. In recent years, persons challenging governmental action on First Amendment grounds have often urged this Court to review the facial validity of a regulation rather than its "as applied" constitutionality, in the hope of invoking the First Amendment overbreadth doctrine. Compare *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) with *Gooding v. Wilson,* 405 U.S. 518 (1972). Such an approach deflects this Court's scrutiny from the actual facts of a given case to a hypothetical set of facts. In this case, the Commission seeks to deflect attention from the actual facts to a hypothetical set of facts in order to uphold the regulation's constitutionality.

It is, LILCO suggests, inappropriate to apply either mode of facial review to commercial speech. Instead, regulations affecting commercial speech should be subjected to "as applied" review to determine whether, on the facts of each case, the government's interest in prohibiting a given communication outweighs the consumer's interest in receiving the information in question. *Bates v. State Bar of Arizona,* 433 U.S. 350, 380 (1977); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 462 n. 20 (1978). See generally, *Marsh v. Alabama,* 326 U.S. 501 (1946); *Cohen v. California,* 403 U.S. 15 (1971). When such an analysis is applied to the Commission's refusal to permit LILCO to discuss the merits of electric heat, the regulation is clearly unconstitutional "as applied".

First, the Long Island consumers affected by the Commission's regulation have an obvious and powerful interest in acquiring truthful information necessary to an informed choice on the relative merits of competing forms of space heating.[31]

Second, the mode of communication used by LILCO is neither potentially misleading nor potentially coercive. *Friedman v. Rogers,* 440 U.S. 1 (1979); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978).

Third, the government has little or no legitimate interest in promoting conservation and dampening unnecessary demand by enforcing public ignorance. Eg.

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[31] Unlike the purely commercial information at issue in *Friedman v. Rogers,* 440 U.S. 1 (1979), LILCO's heating advertisements involve matters of general concern transcending "pure" commercial speech. *Friedman v. Rogers,* 440 U.S. 1, 10 n. 9 (1979).

Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); *Carey v. Population Services, Inc.*, 431 U.S. 678 (1977). Thus, while the Commission has a strong interest in prohibiting false, misleading or coercive advertisements, the Commission has no legitimate interest in suppressing truthful information merely because it may persuade persons to engage in perfectly lawful activity.

When one balances the strong consumer interest in receiving the information in question against the impermissible governmental interest in its suppression,[32] the wisdom of the District Court's decision to invalidate the ban "as applied" is apparent.

II.

In prohibiting LILCO from discussing merits of electric heating while freely permitting LILCO's competitors to discuss the merits of oil heating, New York has effected an unconstitutional discrimination based upon the content of proposed speech.

The Commission has forbidden LILCO from discussing the relative merits of oil and electric space heating. On the other hand, no regulation inhibits oil dealers from engaging in the aggressive promotion of oil heat and the aggressive denigration of electric heat.[33] The

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[32] Given the lack of a permissible governmental interest in suppressing truthful, non-coercive speech, it is questionable whether a balancing test is appropriate at all.

[33] Representative examples of communications by oil dealers on the relative merits of oil and electric heating are annexed to the affidavit of Ira Freilicher as Exhibit V. [A 127a].

net result of New York's existing regulation is a grossly discriminatory scheme pursuant to which proponents of oil heat are granted a state created informational monopoly. Such a grossly discriminatory regulation of speech violates basic tenets of equality in the application of the First Amendment.

This Court has painstakingly evolved an equal access principle in the area of First Amendment which forbids the government from discriminating among speakers on the basis of content. E.g., *Police Department of Chicago v. Mosley,* 408 U.S. 92 (1972). In *Mosley,* the Court invalidated a prohibition on picketing next to a school on the ground that the ordinance permitted labor picketing, but banned picketing involving non-labor issues. Mr. Justice Marshall, writing for a unanimous Court, stated:

> "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. . . . But above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.
>
> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intended to say. Selective exclusions from a public forum may not be based on content alone. . . .
>
> Guided by these principles, we have frequently condemned such discrimination among different users of the same medium for expression. 408 U.S. at 95-96.

By permitting only one side of an issue to be publicly discussed, the Commission has engaged in an even more blatant violation of the equal access principle than the discriminatory ordinance at issue in *Mosley*.[34]

Thus, regardless of the intrinsically protected nature of LILCO's commercial communication, so long as New York permits public discussion of the relative merits of oil and electric heat, New York may not permit one side of the dispute to be aired freely, while imposing an absolute ban on the dissemination of a contrary view. See also, *Schacht v. United States,* 398 U.S. 58 (1970) (invalidating ban on use of military uniforms in skits because banned only when would discredit military).

Since the Commission's absolute ban on electric heating advertisements unconstitutionally impedes the dissemination of accurate information, and does so in a blatantly discriminatory manner, it should not be permitted to stand.

The Commission seeks to avoid the impact of *Mosley* by arguing that, since it lacks power to regulate advertisements by oil dealers, it cannot be guilty of discriminatory treatment. However, the issue is not whether the Commission has discriminatorily exercised

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[34] For earlier Supreme Court applications of the equal access principle to condemn content based discriminatory activity, see e.g., *Niemotko v. Maryland,* 340 U.S. 268 (1951); *Fowler v. Rhode Island,* 345 U.S. 67 (1953). See also, *Flower v. United States,* 407 U.S. 197 (1972). For state court application of the equal access principle, see, e.g., *Danskin v. San Diego Unified School District,* 28 Cal.2d 536, 171 P.2d 885 (1946); *East Meadow Community Concerts Ass'n v. Board of Education,* 19 N.Y. 2d 605, 224 N.E. 2d 888, 278 N.Y.S. 2d 393 (1967); *Indiana Civil Liberties Union v. Indiana War Memorials Commission,* 291 N.E. 2d 888 (Ind. 1973).

its power, but whether officials acting under color of New York law have acted to suppress one side of an issue. Surely, the *Mosley* non-discrimination principle cannot be evaded by the simple expedient of selectively parcelling regulatory authority among a series of state agencies. So long as New York has established a regulatory scheme which acts to suppress one side of an issue but permits the other side to speak, it is in clear violation of *Mosley*.

Conclusion

For the above stated reasons the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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Dated: New York, New York
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Appendices

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Docket No. 77 C 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION *et al.*,

Defendants.

MEMORANDUM AND ORDER

PRATT, J.:

I. INTRODUCTION

Plaintiff Long Island Lighting Company (LILCO) commenced this action to declare unconstitutional and to enjoin enforcement of orders issued by defendant New York State Public Service Commission (PSC) which prohibit (1) LILCO's promotional advertising of electrical space heating for residential use, and (2) LILCO's use of inserts in its billing envelopes to disseminate its views on the uses and benefits of nuclear energy. The action is brought pursuant to 42 USC § 1983 and its jurisdictional counterpart, 28 USC § 1343(3); the Declaratory Judgment Act, 28 USC § 2201 *et seq.*; and the first and fourteenth amendments. Jurisdiction of a federal question is also alleged under 28 USC § 1331(a), the rights at issue allegedly being valued in excess of $10,000.[1]

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[1] Since 42 USC § 1983 is a sufficient predicate for jurisdiction under 28 USC § 1343(3), the direct constitutional claims

By memorandum and order dated August 31, 1977, the court permitted certain organizations and individuals to intervene, pursuant to FRCP 24(b), as parties defendant, but solely with respect to the issues involving the bill inserts. LILCO now moves, pursuant to FRCP 65, for a preliminary injunction, or in the alternative, for summary judgment pursuant to FRCP 56. PSC cross-moves to dismiss the action, based on the Johnson Act, 28 USC § 1342.

For purposes of the summary judgment motion, LILCO has conceded the existence of certain material facts alleged by the defendants to be in dispute, although the latter assert that even with such concessions, some material issues of fact remain. Nonetheless, as more fully explained below, the court determines that there are no disputed facts which are material to the dispositive issues.

II. Background and Nature of the Action

A. *The Parties.*

LILCO, a New York corporation, is a public utility engaged in the business of generating and supplying electrical and gas energy to approximately 900,000 residential and commercial customers in the counties of Nassau, Suffolk, and parts of Queens.

PSC is the public authority charged, pursuant to Article IV of the New York Public Service Law, with general powers of supervision and regulation over the activities of gas and electric utilities. See NY Pub. Serv. Law §§ 65, 66.

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asserted under 42 [sic] USC § 1331(a) and the first and fourteenth amendments are disregarded. See *Monell v. Dept. of Social Services*, ___ US ___, 98 SCt 2018 (1978); *Turpin v. Mailet*, 579 F2d 152 (CA2 1978), *judgment vacated*, 47 USLW 3368 (US Nov. 27, 1978), *modified on remand*, 47 USLW 2474 (CA2 Jan. 16, 1979) (en banc).

Intervenors are several individuals and non-profit organizations involved in the dissemination of information on nuclear power issues. Members of the organizations and the individual intervenors are customers of New York utilities, including LILCO, and have been recipients of bill inserts expressing views with which they disagree.

B. *PSC's Policy and Orders.*

In 1973 PSC gave notice of a proposal to issue an order restricting certain uses of electric energy. Prompted by a critical shortage in fuel oil available to generate electricity in the state, PSC proposed a variety of energy saving steps, invited written comments on its proposals, and required each utility to publish the proposals immediately. In addition, PSC ordered that "all electric corporations are hereby prohibited from promoting the use of electricity through the use of advertising * * *". LILCO did not then challenge that prohibition on advertising; instead, it complied with the order by ceasing to advertise electric space heating, a method of residential heating it had actively promoted for a number of years.

In 1976 PSC undertook a reexamination of the subjects of advertising by utilities and the promotion of electricity sales, and after receiving comments on the proposed position, it adopted on February 25, 1977 a "Statement of Policy on Advertising and Promotional Practices of Utility Companies" (Policy Statement). As part of that statement PSC concluded "that the existing ban on promotion of electricity sales should be continued."

Simultaneously with the policy statement, the commission issued an "order implementing certain restrictions on utility advertising" in which it ordered that

> All utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy.
>
> PSC order issued 2/25/77; Ex. III to complaint.

Several public utilities petitioned for rehearing, and on July 14, 1977, PSC issued its order denying those petitions.

On first amendment grounds, LILCO challenges both PSC's continued absolute prohibition against a utility's advertising to promote the use of electrical energy, and its order forbidding the use of bill inserts to present views of LILCO's management on "controversial issues of public policy." LILCO was and is directly affected by both bans, because it wishes to resume its promotion of electric space heating for residences, and it wishes to resume use of bill inserts as a means of promoting management's views on nuclear power, an issue of public policy that concededly is controversial, particularly on Long Island where LILCO is now engaged in planning and constructing two nuclear powered generating stations.

C. *State Court Proceedings.*

After this action was begun, other New York public utilities commenced two Article 78 proceedings in the New York State Supreme Court, Albany County, challenging the same two aspects of the 1977 policy statement and order that are at issue here. In separate decisions dated February 17, 1978, Judge Miner upheld PSC's ban on promotional advertising, but invalidated the ban on bill inserts, finding it to be an unconstitutional restriction on commercial speech. In a brief decision dated July 21, 1978, the Appellate Division, Third Department affirmed on the bill insert issue, but reversed on the promotional advertising issue, thus finding both bans to be constitutional and within PSC's statutory authority. Appeals in both cases are now pending before the New York State Court of Appeals.

D. *PSC's Motion to Dismiss.*

PSC's motion to dismiss the action on the basis of the Johnson Act, 28 USC § 1342, is denied. That statute de-

prives the district court of jurisdiction, under certain circumstances, to "enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency * * *." 28 USC § 1342.

PSC argues that rate issues are involved in both parts of this case in that (1) promotional advertising of electrical energy will eventually cause an increase in rates to consumers, and (2) using bill inserts to promote nuclear energy requires ratepayers to subsidize part of the mailing cost. Thus, according to PSC, both of the challenged orders are based on its rate-making responsibilities.

The Johnson Act "proscribes federal court injunctions of orders affecting public utility *rates*", *United States v. Public Service Com'n.*, 422 F Supp 676, 678 (D Md. 1976) (emphasis in original). While it has been considered that the act's prohibition "is not avoided by basing the action on the civil rights provisions of 28 USC § 1343(3) and 42 USC § 1983", *Klotz v. Consolidated Edison Co. of New York, Inc.*, 386 F Supp 577, 584 (SDNY 1974), it has also been held that "[t]he Johnson Act does not apply to [a] civil rights complaint" that attacks a public electric utility's credit policy, without challenging its electric rates. *Cody v. Union Electric Company*, 545 F2d 610, 611 (CA8 1976). As in *Cody*, the action here does not challenge any rates set by PSC; rather, the complaint alleges that PSC's orders violate LILCO's civil rights under 42 USC § 1983 and the first amendment. Such allegations, if proved, "justify federal remedial action". *Id.* at 612.

The relationship between PSC's orders and public utility rates in New York is indirect, remote, even debatable. Essentially, PSC argues that the effect of these activities, if not proscribed, would be to increase the cost of electricity and thereby force a change in public utility rates. But virtually all that PSC does has similar potential effects on the cost of services, and the Johnson Act was not intended to immunize all public utility activity from federal court injunctions; instead, it prohibits review only of "any

order affecting rates." To fall within the Johnson Act's prohibition, therefore, a challenged order must more directly affect rates than do the ones here under attack. Accordingly, PSC's motion to dismiss is denied.

III. Commercial Speech

Before addressing the two main issues of the case, the court must first consider the role of commercial speech under the first amendment. Until recently the first amendment's protection of commercial speech was severely limited. See, *e.g.*, *Valentine v. Chrestensen*, 316 US 52 (1942). In a series of cases decided since 1974, however, commercial speech has received extensive consideration and analysis, and its protection under the first amendment has been greatly expanded.

In *Bigelow v. Virginia*, 421 US 809 (1975), the Supreme Court stated: "[commercial] speech is not stripped of First Amendment protection merely because it appears in that form." *Id.* at 818. In that case, the Court balanced the first amendment interest against the government interest allegedly served by a regulation making it illegal to sell or circulate any publication encouraging or promoting the processing of an abortion. Holding the statute to be an unconstitutional infringement of the first amendment, the Court noted:

> We need not decide in this case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit. Advertising, like all public expression, may be subject to reasonable regulation that serves a legitimate public interest. * * * To the extent that commercial activity is subject to regulation, the relationship of speech to that activity may be one factor, among others, to be considered in weighing the First Amendment interest against the government interest alleged. Advertising

> is not thereby stripped of all First Amendment protection. The relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.
>
> *Id.* at 825-26 (citations and footnotes omitted).

That commercial speech is entitled to first amendment protection was confirmed in *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 US 748 (1976), where the Court held unconstitutional a state ban on advertising the prices of prescription drugs, concluding that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients." *Id.* at 773.

First amendment protection for commercial speech has been reiterated and reaffirmed in still more recent cases. In *Linmark Associates, Inc. v. Township of Willingboro*, 431 US 85 (1977), the Court struck down a local ban on the posting of "For Sale" signs on residential property, holding that the ordinance in question impaired the flow of truthful and legitimate commercial information to residents. In *Carey v. Population Services International*, 431 US 678 (1977), the Court struck down a ban on advertising contraceptives because the information was a matter of substantial individual and societal interest. In *Bates v. State Bar of Arizona*, 433 US 350 (1977), the court struck down an absolute ban on lawyer advertising, holding that such commercial speech "serves individual and societal interests in assuring informed and reliable decision making", *id.* at 364, and is, therefore, entitled to constitutional protection.

Most recently in *First National Bank of Boston v. Bellotti*, ___ US ___, 98 SCt 1407 (1978), the Supreme Court addressed a matter of collateral concern here, the first amendment rights of a corporation, and flatly rejected the proposition that speech by business entities is

not protected by the first amendment. Invalidating a statute that prohibited a corporation from spending corporate funds in order to disseminate views on state referenda whose issues were not materially related to the company's business, the Court noted that:

> [i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It [discussion of governmental affairs] is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.
>
> *Id.*, 98 SCt at 1416.

Thus, simply because LILCO is a public utility corporation does not deprive it of all first amendment rights.

To determine the constitutionality of the challenged bans on LILCO's communications, the court must balance the first amendment interests asserted by LILCO against the government interests claimed to be served by PSC's orders. See *Bigelow v. Virginia, supra,* 421 US at 826; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra; Linmark Associates, Inc. v. Township of Willingboro, supra.* The balancing analysis must be applied separately to PSC's prohibitions against promotional advertising and controversial bill inserts.

IV. PSC's Ban on Promotional Advertising of Electrical Energy

A. *Factual Background.*

There are three principal methods of home heating available to consumers on Long Island: oil fired space heating, natural gas fired space heating, and electric space heating. Limitations on the supply of natural gas effectively limit the choice to oil and electricity.

LILCO experiences broad seasonal fluctuations in the demand for electrical power; demand increases during the

summer months, attributable to air conditioner use, and decreases during the winter months. As a result, part of the generating capacity that LILCO requires to satisfy summer demand is not utilized during winter months when demand is lower.

To offset some of the fixed costs associated with owning and operating generating facilities all year, and thereby to use its generating facilities more efficiently, LILCO has in the past sought to stimulate electrical consumption during the winter months by advertising the advantages of electric space heating for residential use. Since almost all of LILCO's electrical generating capacity consists of oil fired generating stations, an increase in demand for electrical energy would increase the amount of oil required to generate it.

When the 1973 embargo on oil shipments from the Middle East to the United States caused a domestic oil shortage, PSC sought to limit the demand for electricity by forbidding all promotional advertising by utilities. LILCO complied with PSC's 1973 order and ceased its promotional advertising of electric space heating. Despite contentions that there was no longer a shortage of oil and that oil supplies were sufficient to serve current as well as additional customers of electrical energy, PSC in its 1977 Policy Statement and accompanying order continued its ban on promotional electricity advertising.

In continuing the ban, PSC noted that its highest priority was conservation of energy resources. It reasoned that increased off-peak generation of electricity consumes valuable energy resources and, if it is the result of increased sales, necessarily creates incremental air pollution and thermal discharges to waterways. Moreover, since most of the major utility companies use oil fired generating facilities, any increase in off-peak generation would aggravate the nation's already unacceptably high level of dependence on foreign sources of oil supply. PSC believed "that a continued proscription of promotion of electric sales will result in some dampening of unnecessary

To begin with, LILCO has an obvious economic interest in promoting the use of electrical energy and in advertising the availability of its services for electric space heating. That its interest is economic does not deprive it of first amendment protection. See *Bates v. State Bar, supra*, 433 US at 363-64; *Virginia State Board v. Virginia Citizens, supra*, 425 US at 762-63.

Beyond LILCO's economic interest is the public's interest in the free flow of information on the use of electrical energy for home heating. The consumer has a substantial interest in receiving truthful information on electric space heating. Not only does promotional advertising provide information of general public interest concerning electrical energy, it also assists an individual's economic decisions on the benefits and detriments of electric heat. Choosing among oil, gas, or electric residential heating may significantly affect his budget and daily comfort. Moreover, the public in general has an interest in receiving information on the various methods of heating, in order to utilize energy resources ecologically and efficiently. As explained by Justice Blackmun, writing for the court in *Bates v. State Bar, supra*,

> [t]he listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.
>
> *Bates v. State Bar, supra*, 433 US at 364 (citations omitted).

With respect to promotional advertising, then, "where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Board v. Virginia Citizens, supra*, 425 US at 756.

The next question is whether the interests allegedly furthered by the PSC ban outweigh these first amendment interests.

As reflected in its 1977 Policy Statement, PSC's major reason for continuing its ban on promotional advertising was to curb the increased use of electricity in New York. Additional reasons offered have been the maintenance of an economically stable and efficient electric rate structure and preservation of the environment. PSC's position is clear from its counsel's argument:

> A reversal of the Commission's prohibition on advertising would prohibit the Commission from taking an effective means to curb the growth of electric usage in New York State, a growth that has over the past several years increased costs and rates, consumed expensive foreign oil and increased the environmental impact of public utility operations.
>
> Defendants' Memorandum of Law in Opposition to Motion for Summary Judgment, at 27.

Of course, these are legitimate interests which the state properly may seek to further; but it is the method used, a direct infringement of first amendment interests, that is under scrutiny.

PSC has not sought to limit the use of electricity directly; rather, by suppressing accurate promotional information it is attempting to avoid certain perceived detrimental effects of electric space heating. Although PSC's objectives might properly be achieved through direct regulation of electric space heating or, indeed, of all electrical consumption, PSC is attempting an indirect regulation through the advertising ban, which, by deliberately

inhibiting public awareness of the merits of electric heat, attempts to avoid increased consumption of electricity. This, PSC cannot do, because it is a significant interference with the first amendment. As the Supreme Court has observed,

> * * * it seems peculiar to deny the consumer * * * at least some of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, the argument assumes that the public is not sophisticated enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, *we view as dubious any justification that is based on the benefits of public ignorance.*
>
> *Bates v. State Bar, supra,* 433 US at 374-75 (emphasis supplied).

In *Virginia State Board, supra,* a state licensing authority sought to justify a total ban on advertising the prices of prescription drugs sold by pharmacists. The Supreme Court observed:

> The strength of these proffered justifications is greatly undermined by the fact that high professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject.
>
> * * *
>
> * * * [T]he State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance. The advertising ban does not directly affect professional standards one way or the other. It affects them only through the reactions it is

assumed people will have to the free flow of drug price information.

* * *

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

* * *

It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them * * * in other ways. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.

Virginia State Board v. Virginia Citizens, supra, 425 US at 768-70 (emphasis supplied) (citations omitted).

PSC has statutory power to regulate the use of electrical energy directly by fixing rates, by approving construction of new generating facilities or expansion of existing ones, or by allocating quantities of energy production. See NY Pub. Serv. Law § 66. But it may not do so "by keeping the public in ignorance" of the entirely lawful use of electric space heating. See *Virginia State Board, supra,* 425 US at 770.

PSC argues that the ban does not suppress information concerning electric heat because LILCO is not prohibited from discussing the topic with anyone who seeks information about it. However, permitting communication to a

customer *if* he inquires, does not save the ban. The fact that the seller could provide information to a prospective purchaser who inquired did not save the bans on advertising lawyer services in *Bates v. State Bar, supra;* on posting "For Sale" signs on homeowners' lawns in *Linmark Associates v. Township of Willingboro, supra;* on advertising prices of prescription drugs in *Virginia State Board, supra;* or on advertising contraceptives in *Carey v. Population Services, supra.* Nor does it save PSC's ban on promotional advertising of electric heat.

PSC also argues that its ban does not unconstitutionally suppress information about electric heat because it does not affect advertising by appliance dealers who sell electric space heating devices. This argument is not persuasive. For one thing, PSC has no jurisdiction over such appliance dealers. In addition, "serious questions exist as to whether the [order] 'leaves open ample alternative channels of communication'". *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 US at 93. PSC has presented nothing to show that appliance dealers have been advertising electric heat through newspapers, radio or any other media designed to reach a large audience. Its ban thus has the effect of suppressing virtually all truthful information concerning electric heat.

As the Court most recently observed:

> * * * the First Amendment * * * prohibit[s] government from limiting the stock of information from which members of the public may draw. A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the "free flow of commercial information".
>
> *First National Bank v. Bellotti, supra,* 98 SCt at 1419-20.

Like the statutes and regulations challenged in other cases, PSC's ban on promotional advertising of electricity inhibits the "free flow of commercial information." Although the public interests sought to be served by PSC are important, it is not necessary to suppress protected speech in order to achieve those ends. Since the allegedly harmful consequences of increased usage of electric heat may be regulated by means that are not only more directly related to the results sought, but also less restrictive of LILCO's first amendment rights, PSC's ban on promotional advertising of electricity by public utilities is unconstitutional.

V. PSC's Ban on Controversial Bill Inserts

A. Factual Background.

In order to publicize its belief that "nuclear generated power is the most economical, efficient and socially desirable method of meeting Long Island's need for increased energy", Plaintiff's memorandum at 22, LILCO has at times communicated its views about nuclear power to its customers through the use of bill inserts. LILCO believes that such inserts provide a significant medium for efficiently communicating with its customers at reasonable cost.

There is no claim that LILCO's bill inserts have been false or defamatory, nor is there any dispute that such communications on nuclear power are political in nature, that they must be paid for solely by LILCO shareholders, and that their out-of-pocket costs may not be considered an expense of doing business for rate making purposes.

PSC's ban on the use of such bill inserts had its origin in a complaint filed with PSC by the Natural Resources Defense Council, Inc. one of the intervenors in this case, which sought redress for a similar 1976 Con Edison bill insert that discussed the need for nuclear power development. After investigation and hearing, PSC determined

that bill inserts should not be used to express the opinion of management on "controversial issues of public policy".

In the lengthy policy statement issued on February 25, 1977, PSC explained its reasoning. After summarizing its long-standing position that ratepayers should not bear the expense of advertising which states a utility's position on a matter of public controversy, PSC concluded that such advertising would not be permitted to be included as a bill insert, even when the stockholder pays for it in full. PSC summarized its position as follows:

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.
>
> 1977 Policy Statement at 10-11

When PSC issued its order denying the petitions of various utilities for rehearing, it considered in greater

detail the bill insert restriction in light of the utilities' first amendment contentions. It pointed out that it had not prohibited the companies from making their views known, that use of the bill insert to publicize a utility's views on matters of public controversy was in PSC's judgment improper "since it gives a utility a unique and undue advantage in publicizing its position" to a "selectively chosen target audience", that "the unique advantage * * * is then transformed into a device for presenting only one side of this issue", and that this confers "an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views". PSC Order Denying Rehearing, at 6 (July 14, 1977). PSC also focused on the limitations inherent in this "unique medium of communications". Its size and weight should not be so great as to require additional postage, and it can be mailed only once a month, and in many cases, only once every other month.

In PSC's view, bill inserts should be used "*primarily* to convey information that is clearly helpful to consumers" (emphasis supplied), and the prohibition is aimed at preserving that "public interest objective". Moreover, according to PSC, no one else can obtain the "wide captive audience for bill inserts" that is enjoyed by utilities having monopoly franchises conferred by the government. In its view, this aspect makes the utility bill insert medium analogous to the limited spectrum space available for radio and television broadcasting, a consideration that leads to problems of "fairness" and equal time so as to permit organizations with opposing viewpoints an opportunity to disseminate their opinions as inserts in the utility's bill. *Id.* at 7-8. After considering that approach, all PSC members were convinced ultimately "that it would be difficult to administer fairly, and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures." *Id.* at 8. PSC also noted that the privilege to disseminate utility bill inserts derives

from the privilege of franchise monopoly conferred by the government, and that it can, therefore, be regulated by the government to assure that it is exercised in the public interest.

Solely for the purpose of the summary judgment motion, LILCO has assumed certain facts to be established: (1) that LILCO derives an intangible benefit from the distribution of bill inserts discussing its views on controversial issues, although it contends that no consumer incurs any out-of-pocket expenses attributable to the bill insert program, and, (2) that alternative means of communication, such as newspaper advertising, are available at comparable cost, but that in management's opinion, such alternative means are not as effective a form of expression.[2]

PSC and intervenors argue that there is a factual dispute as to whether LILCO's customers (the ratepayers) are forced to subsidize political views with which they

[2] PSC disputes LILCO's contention that bill inserts are an effective means of communication compared to other methods, but LILCO has acceded to PSC's view for purposes of this motion, so there is no dispute as to this fact. It should be noted, however, that LILCO's position on the relative cost efficiency of bill inserts, compared with other forms of communication to the public, is supported by a PSC ruling that required utilities to use bill inserts to notify customers of prospective rate changes:

> While other methods of notification of rate filings are required by statute and the Commission's rules, the narrative description under discussion should be easier to read and understand and would be provided to all customers directly. *We believe that the bill insert requirement we have proposed should effect a significant improvement in notice to the public at minor cost.*
>
> Petition of Consumer Protection Board, NYS Public Service Commission, Case 26972, at 5-6 (Aug. 10, 1976) (emph. supp.).

Prior to this ruling, utilities were required to use newspaper advertisements to notify customers of proposed rate changes and hearings on such changes. Thus, despite its argument to the contrary in this case, PSC itself has recognized bill inserts as an efficient means of communication.

disagree, or in other words, whether all the costs of bill inserts containing political advertising can realistically be allocated between LILCO's ratepayers and shareholders. PSC claims that cost allocation is difficult for three reasons: first, since bill envelopes are limited in size LILCO would have less space to provide for information related to utility services or energy conservation tips if it provided more space for political messages; second, since the determination of rates is based on past expenses and anticipated increases, LILCO might prevent a loss of earnings stemming from cost allocation of political advertising, by simply spending less on customer service; finally, since rates are also set to insure profits for capital formation, a loss in LILCO's earnings due to cost allocation of political advertising expenses (including such advertising in bill inserts) could be made up by increasing electric rates in order to bring in sufficient income to raise the necessary capital. These arguments about cost allocation, however, are irrelevant to PSC's ban on controversial bill inserts, which was to apply "even when the stockholder pays for it in full." 1977 Policy Statement at 10.

Moreover, PSC has presented no facts to support its contention that, contrary to LILCO's position, costs cannot be allocated between ratepayers and shareholders. See *SEC v. Research Automation Corporation et al.*, 585 F2d 31, 33 (CA2 1978). Indeed, it seems inequitable for PSC to allege a factual dispute that is the result of its own admitted failure to formulate a cost allocation scheme for bill inserts. Nor have intervenors alleged facts to indicate that a fair cost allocation is impossible. On the other hand, LILCO's contention that cost allocation is feasible, is supported by facts. During a three month period in 1977, LILCO employees kept time sheets to determine the extent to which they were engaged in the bill insert process, LILCO's 9(g) Statement, Part B, ¶ 25; a list of hours and allocated salaries, as well as the cost of single sheet and more elaborate bill inserts discussing nuclear power, is also provided. LILCO 9(g) Statement, Part B, ¶ ¶ 25-26.

From these it appears feasible for PSC to allocate the costs of a bill insert so that they may be attributed solely to LILCO's shareholders, and not to its ratepayers.

On the issue of whether bill insert costs can be apportioned, different methods of allocation are possible. One approach would be to charge the shareholders any additional costs of the inserts over and above the costs of mailing the bills to the ratepayers. Another would be just the reverse, that is to charge to the shareholders the full cost of mailing the inserts and envelopes and only incremental costs to the ratepayers for including the bills. A third would be to prorate the costs of the single mailing between the bill and the insert on a basis of space, number of words, or other reasonable manner. In any event, the problem is administrative, not constitutional.

Whatever allocation method might be used, however, to the extent that the cost of an insert is less than the cost of a separate mailing of the same insert, it would represent a benefit or "free ride" to shareholders which had been paid for by ratepayers. Moreover, LILCO concedes that with any method of allocation there would be an intangible benefit from using bill inserts arising out of its access to a prepared mailing list and access to an existing bill stuffing and mailing system.

B. Discussion

1. LILCO and its advocacy of nuclear power are both entitled to some first amendment protection.

In *First National Bank v. Bellotti, supra,* the Supreme Court ruled that corporate speech is entitled to first amendment protection, even when such speech deals with matters unrelated to the corporation's business interests. The thrust of the decision was that in the free discussion of governmental affairs, the nature of the speaker is not constitutionally significant and does not call into question different first amendment considerations. The Court noted

that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." *Id.*, 98 SCt at 1416.

LILCO argues that the purpose of its communications on nuclear power is to inform customers of the advantages of that form of energy and to reassure customers on management's judgment in pursuing the development of nuclear power. The bill inserts prohibited by PSC seek to discuss the merits of nuclear energy, a matter of current debate and divergent opinion. LILCO's proposed construction of nuclear power plants on Long Island is an issue seriously affecting both individual and community interests; since opponents of nuclear energy have campaigned against the building of such facilities, the controversy has received substantial media attention. Even though LILCO may stand to gain commercially from completion of the nuclear plants, the information it seeks to disseminate is essentially political, and "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 US 64, 78 (1964).

It is clear, then, that debate on nuclear power is the type of speech the first amendment was designed to protect, see *Bellotti, supra,* 98 SCt at 1415, and that LILCO's interest in expressing itself on that issue is entitled to first amendment protection. It remains to be determined whether PSC's prohibition of bill inserts as a vehicle for LILCO's expression on a controversial issue such as nuclear power is an unconstitutional infringement of LILCO's first amendment rights of expression.

2. PSC's ban is not unconstitutionally vague.

LILCO argues that the ban on controversial issues of public policy in bill inserts is unconstitutional because it is vague. The court does not agree. LILCO contends that the alleged vagueness of the PSC ban raises three prob-

lems of constitutional dimension: (1) the ban fails to give adequate notice of the scope of its proscription; (2) the ban has a chilling effect on the exercise of first amendment rights; and (3) the ban vests overbroad discretion in PSC to regulate the content of proposed communications.[3] Under PSC guidelines, a public utility's expenditures for political advertising are recorded in a special "below-the-line" account, number 426.4, which excludes them from consideration as business expenses in the rate making process, thus placing their burden on shareholders rather than ratepayers.[4]

PSC interprets this special cost-allocation account to include

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[3] Extending these contentions, LILCO urges that since the PSC ban "applies only to inserts which discuss 'controversial matters of public policy' and explicitly authorizes 'non-controversial' and 'useful' inserts, [LILCO] is unable to determine whether many inserts fall into the proscribed or encouraged category." Aff. of Ira L. Freilicher, ¶ 13. As an example, LILCO refers to a bill insert discussing the federal food stamp program which had been disseminated prior to the PSC ban. LILCO argues that the food stamp program has been the subject of some controversy, and that under the present PSC ban, it would be impossible to determine whether a food stamp insert would now be deemed "controversial" or "useful". See Freilicher aff., ¶¶ 14-15. As a result, LILCO claims that it would be reluctant to disseminate bill inserts on that topic in the future.

[4] The account description provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.
>
> Account 426.4, Expenditures for Certain Civic, Political and Related Activities. 16 NYCRR, Ch. III, Sub. Ch. F.

> All advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes.
>
> 1977 Policy Statement at 10.

PSC has also stated that it would "include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power." *Id.* The account has existed for some time; it has been the subject of various state court and regulatory decisions interpreting what is meant by "political advertising"; and LILCO has indicated that it will continue to cooperate with the PSC cost-allocation guidelines for Account 426.4. Therefore, since the "controversial issues of public policy" now barred by PSC from bill inserts are those matters whose expenses would ordinarily be recorded in Account 426.4 as political advertising, PSC argues that some guidance does exist for utilities to follow in determining whether or not a particular bill insert falls into the proscribed category.

In its decision denying reconsideration of the policy statement, PSC considered the vagueness argument directly:

> The petitioners * * * argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.
>
> In the [cost-allocation] Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through future advisory determination. One such determination was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials

> designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We believe that it does and, therefore, should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to ask it. We will resolve any request expeditiously so that no undue delay will result.
>
> Order Denying Petitions for Rehearing, *supra* at 8-9.

The Supreme Court has stated that:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
>
> *Connolly v. General Construction Company*, 269 US 385, 391 (1926).

In the context of the first amendment, the court has further stated:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms * * *"; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." * * * When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone * * *." * * * For "[t]he threat of sanctions may

> deter * * * almost as potently as the actual application of sanctions."
>
> *Keyishian v. Board of Regents*, 385 US 589, 603-04 (1967) (citations omitted).

The Supreme Court thus requires "more specificity of a statute potentially applicable to expression sheltered by the first amendment than in other contexts * * *." Laurence H. Tribe, *American Constitutional Law* 719 (1978). In *Smith v. Goguen*, 415 US 566 (1974), where the Court invalidated as being unconstitutionally vague, a state provision punishing "contemptuous" treatment of the American flag, the Court noted that "[w]here a statute's literal scope * * * is capable of reaching expression sheltered by the First Amendment, the [due process/vagueness] doctrine demands a greater degree of specificity than in other contexts." *Id.* at 573. See also *Grayned v. City of Rockford*, 408 US 104, 108-09 (1972); *Papachristou v. City of Jacksonville*, 405 US 156, 162 (1972); *Lanzetta v. New Jersey*, 306 US 451, 453 (1939).

Even under these high standards it does not appear that the PSC's exclusion of "controversial issues of public policy" from bill inserts is unconstitutionally vague. In context the phrase is a synonym for the "political advertising" for which expenditures are recorded in Account 426.4. Interpretation of what is "controversial" or "noncontroversial" may be governed by those considerations which determine expenditures recorded in that account. PSC has already had some expertise, and the public utilities some guidance, on what matters are considered "political" and thus subject to recording in Account 426.4; these interpretations may similarly be used as guidelines in determining what is or is not "controversial".

LILCO also cites *First National Bank v. Bellotti, supra*, to support its vagueness argument. There the Supreme Court found unconstitutional a Massachusetts statute barring corporations from making expenditures designed to influence referenda on questions other than those

"materially affecting" the property, business, or assets of the corporation. Justice Powell discussed the vague and deterrent affect of the statute's "materially affecting" standard:

> Even assuming that the rationale behind the materially affecting requirement itself where unobjectionable, the limitation in [the statute] would have an impermissibly restraining effect on protected speech. Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties—personal as well as corporate—provided for in [the statute]. * * * As the facts in this case illustrate, management could never be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue.
>
> *Id.*, 98 SCt at 1420, n.21 (citations omitted).

LILCO argues that the "controversial issues of public policy" standard used in the PSC ban is even more subjective and amorphous than *Bellotti's* "materially affecting" standard. *Bellotti*, however, is readily distinguishable. The rejected standard of the Massachusetts statute had no prior history of interpretation or guidance from court or administrative opinions, whereas the language adopted by the PSC closely parallels the standard of political advertising attributable to Account 426.4, which does have a history of prior interpretation.

Moreover, as an administrative regulation the PSC restriction lacks the chilling impact of the potential jail sentence imposed by the Massachussets statute. It even bears the promise of the PSC to "expeditiously" resolve in advance any doubt about a particular proposed bill insert. Although the delay caused by even an expeditious administrative review might under some circumstances chill speech sufficiently to render the regulation unconstitu-

tional, that is not the case here, where the affected speech lacks spontaneity and is prepared for inclusion in the monthly billing envelope.

Thus, the ban is not unconstitutional on grounds of vagueness.

3. PSC's ban does not otherwise infringe LILCO's first amendment rights.

In its order denying rehearing, PSC stated:

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.
>
> Order Denying Petitions for Rehearing, *supra* at 10.

Thus, PSC's order is not an absolute ban but rather, a restriction on one method of communication, a distinction that the Supreme Court has stated "is not without significance to First Amendment analysis since laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether." *Linmark v. Township of Willingborough*, *supra*, 431 US at 93.

The Supreme Court has

> * * * often approved [time, place, or manner restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.
>
> *Virginia State Board v. Virginia Citizens*, *supra*, 425 US at 771.

See also *Grayned v. City of Rockford, supra*, 408 US at 115-17; *Buckley v. Valeo*, 424 US 1, 17-18 (1976).

However, PSC's prohibition against using bill inserts to express management's views on "controversial issues of public policy" does not fit nicely into the category of a time, place, or manner restriction. As *Virginia State Board, supra*, teaches, three tests must be met before speech may be restricted under that analysis. Two are clearly met here; but the analysis breaks down on the third.

One test that is clearly met here is the requirement of ample alternative channels for communication. As already indicated, PSC has not prohibited utilities from urging nuclear power or other positions of a controversial nature; it has merely deprived them of the bill insert means for expounding their views. All other means of communicating with the public—newspaper advertisements, public speakers, or even house-to-house canvassing—are unaffected by the bill insert ban. Although LILCO may feel that no other approach is as effective or efficient as would be the use of bill inserts, the fact remains, nevertheless, that for communicating its views LILCO has available to it ample alternative channels, indeed all those channels that are available to virtually anyone else in our society who wishes to impress the public with a point of view. LILCO, in other words, is surely no worse off than other would-be communicators.

The second test which has been met here is that the restriction serve a significant governmental interest. PSC best summarized its justifications at pages 6 to 8 of its July 14, 1977 Order Denying Petitions for Rehearing. There, PSC expressed its belief that permitting utilities to use bill inserts to discuss controversial issues would confer an undue advantage on management, and would interfere with the primary function of bill inserts, namely to convey information that is clearly helpful to consumers. The types of information that PSC viewed to be properly distributed at ratepayers' expense, and therefore

presumably appropriately includable in bill inserts, were elsewhere described by PSC as including

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like.
>
> 1977 Policy Statement at 11.

PSC viewed the inserts as directed to a wide captive audience that must open the bill and be exposed to the inserts. From this, PSC reasoned that a degree of fairness or equal time for proponents of opposing views would have to be required and that this, in turn, would not only be difficult to administer fairly, but also would tend to lessen undesirably the number of bill inserts dealing with such useful and uncontroversial information as consumer conservation measures. These are significant governmental interests properly to be weighed by PSC in regulating utilities.

The third test for a valid time, place, or manner restriction, however, is missing here, for it cannot be said that PSC's ban on use of bill inserts to express views on "controversial issues of public policy" is unrelated to the content of the regulated speech. Indeed, it is precisely because of content—controversial issues—that LILCO has been denied access to bill inserts as a medium for advocating nuclear power. The discussion does not end, however, just because the content of LILCO's speech causes its regulation, or because the PSC ban does not fit

the classic mold of a time, place or manner restriction. A content based restriction was upheld by the Supreme Court in *Lehman v. City of Shaker Heights*, 418 US 298 (1974), in which the Court affirmed a judgment of the Supreme Court of Ohio, that held there was no violation of Lehman's first and fourteenth amendment rights when the city refused to permit the display on vehicles of the city transit system of posters advertising Lehman's candidacy for public office. The city had acted under a policy which permitted commercial advertising on its vehicles, but prohibited any "political advertising". Under that policy the city had not accepted or permitted any "political or public issue advertising." Lehman urged in the Supreme Court that the car cards constituted a "public forum" entitled to first amendment protection regardless of their primary purpose.

Four justices disagreed with Lehman, distinguishing the advertising in public transit vehicles "from the traditional settings where First Amendment values inalterably prevail." 418 US at 302. Writing for the prevailing four, Justice Blackmun noted that American constitutional jurisprudence has been jealous to "preserve access to *public places* for purposes of free speech," but he nevertheless reminded us that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Id.* at 302-03 (emphasis supplied). Then, stressing the difference between car card space as an incidental aspect of public transportation and free speech in open spaces, in a meeting hall, in a park, on a street corner, or in a public thoroughfare, he turned his attention to whether the city's policies and practices governing access to the transit system's advertising space were arbitrary, capricious or invidious. He found they were not, because potential revenues could be jeopardized by requiring short term political advertisements, because users would be subjected to the blare of political propaganda, because "there could

be lurking doubts about favoritism," and because "sticky administrative problems might arise in parcelling out limited space to eager politicians." Under those circumstances, Justice Blackmun wrote, "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." *Id.* at 304.

Summarizing his view, Justice Blackmun concluded:

> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation. *Id.* at 304.

Justice Douglas cast the "swing" vote when he concurred in the affirmance because he did not believe "that petitioner has any constitutional right to spread his message before his captive audience." *Id.* at 309.

Writing for the four dissenting members of the court, Justice Brennan argued that Lehman's message was unquestionably protected by the first amendment, that by accepting commercial and public service advertising the city had voluntarily established a forum for communication, and that once a public forum has been established, discrimination-based "*Solely* upon subject matter or content" is prohibited. *Id.* at 316 (emphasis in original). Justice Brennan rejected the distinction between commercial and political advertising because "subject matter or content censorship in any form is forbidden", *id.* at 317, and he found it impossible to draw with accuracy either "the line between ideological and non-ideological speech" or a "manageable line between controversial and non- controversial messages." *Id.* at 319-20. Nor did he accept the

avoidance of "lurking doubts about favoritism" as a justification for excluding political ads when commercial ads were permitted.

Lehman was a close case, perhaps because content restrictions are not favored by the courts. Contrary to LILCO's argument, however, they need not always be justified by state interests that are "compelling". *Lehman* shows that if there is no public forum, then reasonable governmental restrictions on speech may be sustained provided they are not arbitrary, capricious, or invidious. Cf. Tribe, *supra* at 692-93. Such restrictions were upheld in *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F2d 471 (CA2 1976), where the court concluded that school mailboxes, bulletin boards and meeting rooms are not public fora required to be made available to a minority union. And in *Buckel v. Prentice*, 410 F. Supp 1242 (SD Ohio 1976) a school's distribution to parents, via students, of information concerning coming theatrical events, home safety measures and the like, did not establish the "child messengers" as a public forum for first amendment purposes. The court there found that dissemination of such material was a logical and proper extension of the educational function of schools and that it did not "give rise to any right of access to student distribution by parents or other concerned citizens." 410 F. Supp at 1247.

Comparing *Lehman*, itself, with the present case we find many parallels and a few significant differences. In virtually all respects, however, PSC's position is stronger than was that of the City of Shaker Heights.

a. In both cases, there were ample alternate forums available to the speaker.

b. The government's restriction was against "political or public issue advertising" in *Lehman*, and against "controversial issues of public policy" here. Both are content based restrictions aimed at closing the medium to political or controversial messages. However, Justice Brennan's dif-

ficulty in finding a manageable line between controversial and non-controversial messages in *Lehman* may be resolved here through the existing interpretations on cost allocation and the expeditious review procedure promised by PSC.

c. In *Lehman*, the advertising space was owned and regulated by the city, but was offered generally to the public for commercial use. LILCO's mailing envelopes are, of course, owned by LILCO, but regulated by PSC. Historically, LILCO's bill inserts have been messages generated either by LILCO or by PSC, and have not been available for use by the general public at all.

d. Neither the advertising cards on Shaker Heights' busses nor LILCO's bill inserts constitute one of "the traditional settings" where, as Justice Blackmun observed, "First Amendment values inalterably prevail." 418 US at 302. As with the car cards, LILCO's bill inserts involve "no open spaces, no meeting hall, park, street corner, or other public thoroughfare."

e. LILCO is engaged in the commercial activity of providing gas and electric service to the public. Its primary obligation is to provide efficient, economical utility service to Long Island residents under a monopoly franchise that is regulated in the public interest by PSC. Charges for its services are summarized in bills that are mailed in envelopes. From time to time, additional messages to the energy consumer have been included in the bill envelope. At times PSC has required certain messages to be brought to the consumer's attention by that means, and at other times, LILCO has sought to communicate with its consumers directly through the bill inserts. Clearly, what may be included in the billing envelopes is incidental to the basic service functions of both LILCO and PSC, just as providing car card space was incidental to Shaker Heights' function of providing public transportation.

f. In *Lehman*, a major point of difference between Justices Blackmun and Brennan was the former's view that the car cards were not a public forum, and the latter's conclusion that the city's own actions had turned the car cards into a public forum. PSC here, by this very regulation, is helping to prevent the bill inserts from becoming a public forum that would subject them to the strict scrutiny necessary for constitutional operation.

g. Shaker Heights' justifications for prohibiting political or public issue messages on its car cards were that the limitation on access to the advertising space would minimize (1) chances of abuse, (2) the appearance of favoritism, and (3) the risk of imposing upon a captive audience. All were accepted by Justice Blackmun as reasonable legislative objectives. Essentially similar justifications have been offered by PSC for keeping controversial issues of public policy out of utilities' bill inserts: (1) the risk of imposing on a captive audience, (2) the appearance of favoritism toward utilities' views on controversial issues, (3) the difficulties inherent in counteracting that appearance by permitting other points of view, and (4) the inevitable charges of improper conduct when PSC is placed in the position of an arbiter of fairness on controversial views, many of which may be far removed from matters of utility management and regulation.

In addition to the foregoing, however, PSC has two more justifications to add to its side of the balance. It seeks to protect the bill insert medium from over-use so that it may be preserved for important and useful information which PSC deems necessary for the consumer to use the utilities' services efficiently, economically and safely. In addition, PSC clearly seeks to avoid making a "public forum" out of the bill inserts, and thereby to steer clear of the issue that so sharply divided the Court in *Lehman*. As the Supreme Court found in *Police Department of Chicago v. Moseley* 408 US 92, 96, 92 SCt 2286,

2290 (1972), "once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Since substantial constitutional and administrative consequences would flow from a determination that a particular medium of communication qualified as a "public forum", surely PSC may limit use of the billing mechanism so that it does not become such a forum. In this way PSC could avoid being enmeshed in a wide variety of issues and considerations that are not directly related either to the regulatory responsibilities of PSC or to the business of the utilities it regulates.

In short, on this issue, the Supreme Court in *Lehman* upheld against a first amendment challenge a governmental prohibition against "political and public issue advertising" on rapid transit vehicles. *A fortiori*, PSC's ban of "controversial issues of public policy" from the bill inserts of New York public utilities does not infringe the first amendment.

VI. Conclusion

On the promotional advertising issue, LILCO is entitled to judgment (a) declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities, issued by defendant PSC on February 25, 1977, and all subsequent implementing orders of the PSC, to the extent that they prohibit plaintiff LILCO from truthful promotional advertising of electric space heating, violate the first amendment and are, therefore, unconstitutional, and (b) enjoining PSC from enforcing the prohibition.

On the bill insert issue, PSC and the intervenor defendants are entitled to judgment declaring that the portion of the order issued by PSC on February 25, 1977 that reads "all utilities subject to the jurisdiction of this Com-

mission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe LILCO's rights under the first and fourteenth amendments to the United States Constitution.

The Clerk shall enter judgment accordingly.

SO ORDERED.

Dated: Westbury, New York
March 30, 1979.

/s/ GEORGE C. PRATT
GEORGE C. PRATT
U. S. District Judge

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

77 C 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION; ALFRED E. KAHN, as Chairman of the New York State Public Service Commission; EDWARD BERLIN, as Deputy Chairman of the New York State Public Service Commission; and HAROLD A. JERRY, JR., EDWARD P. LARKIN, CARMEL CARRINGTON MARR, ANNE MEAD and CHARLES A. ZIELINSKI, Members of the New York State Public Service Commission,

Defendants,

SCIENTISTS' INSTITUTE FOR PUBLIC INFORMATION, NATURAL RESOURCES DEFENSE COUNCIL, INC., FRIENDS OF THE EARTH, CONSUMER ACTION NOW, JOAN MCCALL and SUSAN MAINWARING,

Intervenors.

JUDGMENT

A memorandum and order of Honorable George C. Pratt, United States District Judge, having been filed on March 30, 1979, declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities issued by defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, and all

subsequent implementing orders of THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electrical space heating, violate the first amendment and are, therefore, unconstitutional, and, further, enjoining THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) from enforcing the prohibition;

And aforesaid memorandum and order, also declaring, on the bill insert issue, that the portion of the order issued by THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, that reads "all utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's (LILCO) rights under the first and fourteenth amendments to the United States Constitution, it is

ORDERED and ADJUDGED that plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) have judgment declaring that the Statement of Policy on Advertising and Promotional Practices of Public Utilities, issued by defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977, and all subsequent implementing orders of THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC), to the extent that they prohibit plaintiff LONG ISLAND LIGHTING COMPANY (LILCO) from truthful promotional advertising of electric space heating, violate the first amendment, and are, therefore, unconstitutional, and that defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) is enjoined from enforcing the prohibition;

IT IS FURTHER ORDERED and ADJUDGED that defendant THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC)

and the intervenor defendants have judgment declaring that the portion of the order issued by THE NEW YORK STATE PUBLIC SERVICE COMMISSION (PSC) on February 25, 1977 that reads "all utilities subject to the jurisdiction of this Commission shall discontinue the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy," does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's rights under the first and fourteenth amendments to the United States Constitution.

Dated: Westbury, New York
March 30, 1977

/s/ _____
Clerk

/s/ _____
Deputy Clerk

Approved:

/s/ GEORGE C. PRATT
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

77 Civ. 972

LONG ISLAND LIGHTING COMPANY,

Plaintiff,

—against—

THE NEW YORK STATE PUBLIC SERVICE COMMISSION *et al.*, *Defendants.*

MEMORANDUM AND APPEAL

PRATT, J:

Defendant New York State Public Service Commission (PSC) has moved, pursuant to FRCP 52(b), for the court to amend or make additional findings of fact in connection with the memorandum and order of March 30, 1979, declaring that PSC's ban on New York utilities' promotional advertising of electric space heating violates the first amendment. In addition, PSC seeks a stay of the court's order pending determination of the Rule 52(b) motion and appeal. Plaintiff Long Island Lighting Company (LILCO) opposes PSC's motion and the request for a stay.

As grounds for the Rule 52(b) motion, PSC argues that the court, in its March 30, 1979 opinion, "omitted or misconstrued certain material facts supporting state interests" that PSC had alleged. Specifically, PSC asserts (1) that the court, did not account for the constant availability of base load generating facilities during the winter

months, and their increased oil usage to generate more electricity; (2) that the court erred in stating that the PSC has not barred utilities from advertising the merits of gas fired space heating; (3) that the court omitted certain factual allegations by PSC concerning the effect of promotional advertising on electric rates; (4) that the court did not address the impact on consumers of improperly structured rates stemming from promotional advertising; and (5) that the court failed to discuss PSC's allegation that promotional advertising of electric space heating would stimulate a general rise in demand for electricity, thereby obstructing efforts by PSC and utilities to conserve energy. PSC also argues that the court was incorrect in concluding that the factual issues raised by PSC are relevant to direct regulation of electric heat, but not to promotional advertising of electric heat.

While PSC argues that the court "omitted or misconstrued" certain facts, the decision reveals that the court assumed, for purposes of the decision, that promotional advertising *would* increase the demand for electricity, *would* require use of more oil to generate the electricity, and *would* have an effect on electric rates. With respect to the claim that there would be an adverse effect on consumers because of rates which had been improperly structured by the PSC, the court assumed that it was within the power of the state, either through the PSC or the legislature, to restructure the rates should that be necessary.

With respect to utility advertising of gas fired heating, the court erred in stating that the PSC has not barred such advertising, but the court does not consider this fact to be dispositive of the underlying issue in this aspect of the case; whether PSC may do indirectly, through a ban on promotional advertising, that which it has thus far chosen not to do directly, that is, restrictions on usage of electricity. Thus, except for the gas advertising ban, each of the "omitted" facts that PSC asserts on this motion was considered by the court and either weighed in

evaluating PSC's interests, or deemed irrelevant or immaterial to a ban on advertising, as opposed to a restriction on use. The Supreme Court decisions relied upon in the March 30 decision make it clear that an otherwise entirely lawful commercial activity may not be regulated indirectly by prohibiting truthful advertising to consumers about that activity.

The factual issues referred to by PSC go to the merits of direct regulation of electric space heating, and, therefore, are not material to a decision on LILCO's first amendment rights in the promotional advertising of such an activity. PSC's motion pursuant to FRCP 52(b) is, therefore, denied, and PSC's request for a stay pending determination of the motion is denied as moot.

PSC seeks, in addition, a stay of the court's March 30, 1979 order pending appeal to the Second Circuit. Under FRCP 62(c), the district court may, in its discretion, stay the effect of an injunction during the pendence of an appeal. The ban of which LILCO complains and now has had invalidated was imposed in 1973. LILCO waited until 1977 to challenge that ban in this action. The questions presented are of significant public importance, and it does not appear that LILCO will suffer any significant injury if its promotion of electric heat is delayed another few months in addition to the five years it took for the issue to be submitted to this court for determination. Accordingly, the request for a stay pending appeal of that portion of the court's judgment which enjoined enforcement of the ban on promotional advertising of electric heat is granted on condition that PSC diligently prosecute the appeal.

Finally, in the court's memorandum and order of March 30, 1979, lines 15-16 on page 5 (Part II, C. State Court Proceedings) is hereby amended to read as follows: "Third Department affirmed on the promotional advertising issue, and reversed on the bill insert issue * * * ."

SO ORDERED.

/s/ GEORGE C. PRATT
GEORGE C. PRATT
United States District Judge

Dated: Westbury, New York
April 16, 1979